Case and Comment
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Who Owns the Water Powers?

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DAM ON THE MISSOURI RIVER NEAR HELENA, MONTANA.
This dam is nearly 500 feet long and 130 feet deep. Back of it is the great Reservoir, known as Hauserlake, formed in the Mountains.

A LIVE text for the discussion which I here present may be found in the present dispute in the Congress over the so-called Connecticut river bill (§ 8033), now pending in the United States Senate after conflicting reports and recommendations from the Senate commerce committee.

The Connecticut River Company, originally a navigation company, many years ago constructed, outside the main river channel, a navigation dam and locks to take boats around Enfield rapids, which are located in the Connecticut river between Hartford, Connecticut, and Holyoke, Massachusetts. It was a private enterprise under a charter of the state, intended to be supported by tolls. Industrial development subsequently made the water power the chief source of income, and the Connecticut River Company's business became a water power enterprise to the extent that it ceased charging navigation tolls. By amendment of its charter, it was made a water power company.

In order to enlarge its water power facilities and business, it now proposes to construct a dam across the main channel of the river, thus utilizing the entire flow; and it has asked the Congress for permission so to do, under the Federal statutes requiring the consent of the Congress to such structures. The object of the company is to develop water power appurtenant to the riparian lands and rights which the company has, or which it may acquire for the purpose of this enterprise. The dam is to be of such height that it will create slack water navigation over the location of the rapids, if provided with necessary locks.

The question is, What restrictions and obligations may and shall the Congress impose as a condition to its consent to the proposed dam? Besides the customary requirements that the dam owner shall construct and maintain locks and other provisions protective of the free use of the navigation facilities afforded by the dam, it is also proposed by the act now before the Congress to impose the obligation upon the Connecticut Company of paying, out of its water power proceeds, an annual charge to the Federal government, on the theory that the consent of the Congress "gives" to the company valuable water power belong-

ing to the government, and that, therefore, the government has the right to participate in the proceeds of the beneficial use of the water power as such. On the same theory it is urged that such annual return to the government out of the water power proceeds may extend to all revenues beyond a reasonable return to the company on its investment.

The dispute in the Congress in this case is not between the company and the government, but is between two factions in the Congress who differ as to the proprietary rights in the water power itself. The advocate of either view, whether in Congress or out, does not stand as holding a brief either for or against the company; for the company itself is ready, if necessary, to accept the burden proposed, rather than to be deprived of the necessary consent to construct and maintain its dam. The dispute is one of principle, and involves the question as to whether the federal government owns and controls the water power in question, or whether it does not. If it does, then the proposed charge in favor of the government is justified. Otherwise, if it does not. Those favoring the negative are called upon to explain to whom the water power does belong; and hence arises the question,—If it does not belong to the government, does it belong to the state, or does it belong to the company or other individuals?

The nature of the dispute is further disclosed by the following claims made by the disputants, who include not only Senators, but heads of departments:

Divergent Views.

The Secretary of War, in his report to the President, December 2, 1912, p. 29, says: "That the Federal government has the right to construct dams for the improvement of navigation and a proprietary interest in the water power developed by the structures so built is settled beyond question. (Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97, 173 U. S. 190, 43 L. ed. 663, 19 Sup. Ct. Rep. 316; 29 Ops. Atty. Gen. 173, 185). It seems equally clear that what the government may do of itself, it may do by an agent, and may therefore utilize and adopt for the purposes of navigation a dam allowed to be built by private capital upon fair and proper terms between the two interests as to the value of the water power thus created. Applications are being constantly made by private parties for permission to build dams in such rivers for the purpose of developing water powers."

And he urges the policy of imposing charges which will allow the Federal government a share in the beneficial use of the water power.

Again, in a letter to Senator Nelson, chairman of the Senate committee on commerce, dated January 2, 1913, the Secretary of War, referring to the Connecticut river bill, says: "I am of the opinion that the project embraced in the bill, whereby the lock and dam are built by the grantee as an agency of the Federal government, is very advantageous to the United States. On the other hand, the bill will give to the Connecticut River Company very valuable water power rights in connection with this work of improvement. . . . The bill should not become a law unless a provision is added giving the Secretary of War authority, as one of the conditions of the privilege granted by the act, to require the grantee to pay to the United States a reasonable annual return," etc.

Senator Burton, as chairman of the national waterways commission, in its final report (p. 61), taking the same view as to the proprietary interest of the federal government in water power, says: "That a grant for water power development constitutes a special privilege, for which the government is entitled to proper compensation, is a principle which should be clearly established. . . . Every grant of the government should be dependent on the payment of such reasonable charges as may be determined by the circumstances and equities involved in each case."

The Secretary of the Interior has announced this same view, not merely as to water powers appurtenant to lands of which the Federal government is proprietor, but also as to water powers appurtenant to private riparian lands.

Senator Burton, submitting the majority report from the committee on com-

merce on the bill in question (Report No. 1131, U. S. Senate, January 20, 1913), advocating the inclusion of the provision for charges in favor of the Federal government out of the water power proceeds, says: "It appears to be a settled question that the Federal government may impose a charge for the use of surplus water, not needed for purposes of navigation, which may be made available incidental to the construction of a dam by the Federal government for purposes of navigation. . . . The bill presented marks the most distinct step yet taken toward this method for the improvement of navigation in combination with hydro-electric development under the control and supervision of the Federal government, but without Federal expenditure. . . . . It is believed that the authority of the Secretary of War to require a return to the government in case the corporation earns more than a reasonable return upon its bona fide investment will be in effect a regulation of the charges of the company as well as a source of revenue to the government," etc.

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Instances of the opposing views are the following:

The report of the subcommittee of the committee on the judiciary of the United States Senate, submitted by Senator Nelson, pursuant to Senate resolution No. 44 (Sixty-second Congress, Second session), directing the judiciary committee to report to the Senate, besides other matters, on the power of the government to regulate the use of water power and to impose charges to be paid to the government therefor, says: "The Federal government has no water power to sell or charge compensation for, for it is only authorized by the Constitution to regulate interstate and foreign commerce, which in this case means navigation."

In Senate document 351, Sixty-first Congress, Senator Nelson, referring to this question, says: "Each individual state of the Union has control of the waters of navigable streams and lakes within its borders, the right and interest of the United States in such waters being only that their navigability be preserved for interstate commerce. The title in each state and the use of the water is a matter of state regulation."

Senator Nelson, in his former report on the James river bill (Senate report 585, Sixtieth Congress, first session), referring to the proposal to insert in the water power dam consent bill provision for compensation to the government, says: "In such cases the Federal government has nothing to sell, and therefore has no moral or legal ground to demand compensation in any form."

Senator Bankhead, making the minority report from the committee on commerce on the Connecticut river bill (report 1131, part 2, Sixty-second Congress, third session, January 24, 1913), in which he is joined by Senator Nelson and seven other members of the committee, recommends the elimination of the provisions for charges payable to the government for the following reasons:

"(1) If the Federal government has no right, and it has none, to control the use of the water power in the Connecti-

cut river, then Congress cannot legally legislate on the subject of such control.

"(2) Because, if the bill is not amended as suggested, a valuable natural resource of the state of Connecticut is confiscated.

"(3) Because the state of Connecticut owns the water and the bed of the Connecticut river, and the Federal government, having no 'proprietary interest in the water power' of said river, 'has no moral or legal ground to demand compensation in any form' for the use of the water power in said river.

"(4) Because the Federal government has no right to withhold its permit for the building of the dam proposed by the Connecticut River Company in said Connecticut river, for the building of this proposed dam and lock will not interfere with navigation, but improve it."

On January 29, 1913, Senator Jones offered an amendment to the Connecticut river bill, striking out the provision for charges to the government, and inserting in lieu thereof a provision compelling the Connecticut River Company to recognize the right of the state of Connecticut, beside other things, to exact from the Connecticut River Company out of its water power earnings annual charges for the benefit of the state.

Where Does Proprietary Interest Vest?

This controversy over the Connecticut river bill is a crucial one. It is interesting because the dispute is not one either for or against the Water Power Company particularly concerned. It is a dispute over the principle involved; for, as stated by Senator Burton, "the bill presented marks the most distinct step yet taken" by the Federal government in asserting a proprietary interest in water powers, and, therefore, to the beneficial use of water powers upon navigable streams, as against not only the States, but also as against individual riparian owners.

The committee on interstate and foreign commerce of the House of Representatives, Sixtieth Congress, second session, after fully considering the questions involved in the James and Rainy river bills, following most careful investigations and hearings, speaking of the then existing general dam laws, and referring to the burdensome conditions therein imposed upon the dam owner to construct and maintain locks, and to turn them over to the government for operation, and to furnish power for the same, and other provisions for the full protection of navigation interests, says that these laws as already enacted by the Congress have the effect "to extend the regulating power of the national government, through the War Department, to the largest practicable limits under the Constitution."

Since that report, however, further proprietary rights in the government have been asserted by the dam act of June 23, 1910; and the disputed provision of the present Connecticut river bill goes still further, and asserts once for all the doctrine that the proprietary rights of the Federal government in the water powers of navigable streams are paramount to those of either the state or the riparian owner.

Where, then, does the law vest the proprietary interest in such water powers?

In order to obviate confusion, let it be borne in mind that my discussion has reference to water powers appurtenant to private riparian lands on navigable streams in those states where the law of riparian rights has been established as the law of property rights. This means those states, located generally east of the Mississippi river, where the law of rights by prior appropriation has not replaced that of the common law of riparian rights. It excludes also cases where the government holds not only as sovereign, but also as proprietor,—either because it has not devested by grant its original title, or has acquired by subsequent grant a new title,—the title to the riparian lands or the water power rights in question. Where the government, Federal or state, holds or acquires riparian land or water power rights, or both, as proprietor, it can deal with them as proprietor. The question here is, as to the rights of the government in respect to water powers naturally appurtenant to riparian lands not held by the government in a proprietary capacity. It involves the relation of the government to

the water powers upon navigable streams, and the power of government, under the guise of regulating navigation, to assert proprietary ownership or control of water powers, improved or unimproved, in such navigable streams.

Federal Government Does Not Own Water Powers.

There are three possible proprietary interests in water powers: (1) The Federal government, (2) the state, and (3) the individual owner. The assertion that the Federal government has any proprietary ownership or right of control of the water powers, such as are here referred to, is wrong. The assertion that the state has such proprietary rights is also wrong. Neither the Federal government nor the state government has a proprietary interest in such water powers, but only a limited and qualified interest as sovereign,—a sovereign interest in trust, limited to such control as is reasonably necessary to protect the interests of navigation. These two sovereign interests, while conflicting because they are for the same purpose, are governed by the well-established rule that the interests for navigation purposes vested in the federal government are paramount to those of the state, and both are paramount to the individual water power rights.

Limitations as to Federal Control.

The following rules of law are established as those relating to Federal control:

"1. That the authority for Federal control of fresh navigable streams and waters in the United States, which at the same time defines and limits such control, arises solely from that power which has been expressly reserved to the United States by the Federal Constitution,—the power to regulate commerce between the several states and foreign nations.

2. That this power of control was expressly reserved to the Federal government by the states originally adopting the Federal Constitution, and by all states since admitted under that Constitution; and, subject to this specific power so reserved in the Federal government, there has passed over to those states, upon their entry into the Union, all powers and interest, whether of ownership or of control, now or formerly belonging to the Federal government, in the beds and waters of such navigable streams, and the Federal government has since retained, and still retains, either as against any claim by a state or by an individual riparian, or both, only the specific paramount right of control for the specific and limited purpose of commerce, that is, of navigation. Moreover, this federal power of control is purely a sovereign power of control for a specified public use, and does not include, and cannot be extended to, any element of a proprietary right or interest.

3. That, subject to this purely sovereign right of control of navigation, all right, title, and interest, sovereign and proprietary, belongs to the state, or to individual riparian owners, or both; and it is not within the Federal authority or power, either judicial or legislative, to fix or determine, as between a state and an individual owner, the limitations between state and individual ownership or control of water powers. The rights and obligations, as between a state and an individual owner, are fixed by the law of property as established by the decisions of the state supreme court in the state in question. This law of property, as so fixed in any state, is, as to streams in that state, binding upon the Federal government and its Supreme Court."

These rules were established by the case of St. Anthony Falls Water Power Co. v. Water Comrs. 168 U. S. 358, 42 L. ed. 501, 18 Sup. Ct. Rep. 157, and other cases cited below.

Control by State as Against Riparian Owner.

The following rules of law are established, governing the right of control as between the state and the riparian owner:

1. The title and power of control by the state over the beds and waters of navigable streams are not in any degree proprietary in nature or extent. They are limited to a holding in trust, as a sovereign, for the specific purpose of protecting a public use, to wit, navigation and certain allied public uses.

2. The title and the power of the state

are subject only to the Federal paramount power of control, as established and defined as above demonstrated. They are limited also by the private proprietary right of the riparian, as fixed by the law of the state.

3. The private riparian owner owns and retains all, and the only, proprietary title, right, and interest, either to the beds and waters of such streams or to the usufruct thereof. He has the proprietary right to the beneficial use of the flow of the waters in connection with the natural head and fall upon or opposite his riparian land, and to the whole thereof; he has a proprietary right to utilize the bed and waters for the development of power and for the operation of water power plants. This right belongs to him *jure naturæ*, that is, because it is a natural resource and right belonging to and appurtenant to his riparian land and a part thereof. And this private proprietary right is subject only to the sovereign right of control by the Federal and state governments, for the public use of navigation.

4. As between the state and the riparian owner, the sovereign power of control of the former ends where the proprietary right of the latter begins; and the private right exists up to the point beyond which it would be inconsistent with the specific and limited public right. This private proprietary right of the riparian is the same, whether the title to the bed of the stream, either below high-water or below low-water mark, is said to be held by the state or by the riparian. The attempted distinction between the riparian rights, on the basis of the riparian's having a mere easement instead of a title, is, so far as these questions are concerned, purely speculative. (See cases next below cited.)

I shall not argue these rules in detail, nor give extended citations, but it should be kept in mind that it is a well-settled principle of law that nobody, whether sovereign or individual, owns the *waters* of any stream. The proprietary right, wherever it is vested, extends only to the *usufruct* or right of beneficial use of the waters as they naturally flow; for no one, government or individual, has the right unreasonably to prevent the waters from flowing as by nature they were wont to flow. This right of usufruct is appurtenant to and a part of the riparian land, and belongs to the owner of the riparian land; and this is true of private unnavigable streams as well as of public navigable streams, and whether the stream be intrastate or interstate or an international boundary. (See St. Anthony Falls Water Power Co. v. Water Comrs. 168 U. S. 358-365, 42 L. ed. 501-503, 18 Sup. Ct. Rep. 157; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 79; People ex rel. Niagara Falls Hydraulic Power & Mfg. Co. v. Smith, 70 App. Div. 543, 75 N. Y. Supp. 1100, affirmed in 175 N. Y. 469, 67 N. E. 1088; Hobart v. Hall, 174 Fed. 433; Sweet v. Syracuse, 129 N. Y. 335, 27 N. E. 1087, 29 N. E. 289; Smith v. Rochester, 92 N. Y. 474, 44 Am. Rep. 393; Brookhaven v. Smith, 188 N. Y. 74, 9 L.R.A.(N.S.) 326, 80 N. E. 665, 11 Ann. Cas. 1; State ex rel. Wausau Street R. Co. v. Bancroft, 148 Wis. 124, 38 L.R.A.(N.S.) 526, 134 N. W. 330; Union Depot, Street R. & Transfer Co. v. Brunswick, 31 Minn. 297, 47 Am. Rep. 789, 17 N. W. 626.)

All proprietary interest in the water power as such is a part of the proprietary interest in the riparian land and rights which are appurtenant to it. The sovereign government, whether Federal or state, holds as sovereign no proprietary interest in the water power. There belongs to the proprietary interest, wherever that interest may be vested, all the beneficial use and all the advantages of the beneficial use, including all revenues; and without any diminution, except as the quantity of water power available for revenue may be by reasonable necessity affected by the construction, maintenance, and operation of navigation facilities. The two uses of the river, the one for power and the other navigation, are, in a measure, conflicting. Water power uses belong to the riparian. Navigation uses belong to the sovereign government. Each use must have regard for the other, and each use must be adapted

to the other so as to prevent, each to the other, any unreasonable interference, although the use for navigation is paramount to the extent that so far as reasonably necessary the interests of navigation have a prior right to protection. (Union Bridge Co. v. United States, 204 U. S. 399, 401, 51 L. ed. 539, 540, 27 Sup. Ct. Rep. 367; Crookston Waterworks Power & Light Co. v. Sprague, 91 Minn. 461, 467, 64 L.R.A. 977, 103 Am. St. Rep. 525, 98 N. W. 347, 99 N. W. 420; State ex rel. Wausau Street R. Co. v. Bancroft, supra).

The right, therefore, to the beneficial use of the water power, or any part thereof, cannot be asserted except on the basis of a proprietary interest in the water power itself. This proprietary interest in the water power may, by virtue of the proprietorship of the riparian rights, vest in either (1) the Federal government, or (2) in the state, or (3) an individual riparian owner. If it is vested in the sovereign government, either state or Federal, then the sovereign and proprietary interests are combined. If it vests in the individual riparian owner, then we have separate owners of the two respective conflicting interests, one of which, however, is paramount to the extent already defined.

Where the riparian lands are yet a part of the public domain, and have not passed with the appurtenant water power rights to private ownership, then both the proprietary and the sovereign interests are united; and if the riparian land is owned by the Federal government, it can dispose of its lands and the rights appurtenant thereto in such manner and on such conditions as it sees fit. So, also, may the state, where it is riparian proprietor. Again, either the state or the Federal government may acquire, by purchase, private riparian lands and rights, and thereby become vested with a proprietary interest, and afterwards as such proprietor own and control the beneficial uses of the water power appurtenant to its riparian interests or any part thereof. But the right of the government, Federal or state, in any particular instance to impose charges, or in any way to control the revenues from water power, depends upon the nature of its interests, whether as proprietor or not, in the riparian rights at the point in question. Where the dam is constructed solely or primarily for navigation improvement, whether it be directly by the government or indirectly by a private navigation company organized and acting for the improvement of navigation under government authority, the government, or such navigation company, must first acquire, by purchase or condemnation, the private riparian land and rights necessary for the construction, maintenance, and operation of such structure. Although, with respect to such navigation improvement, the government exercises its sovereign power to regulate commerce, that is, navigation, it has incidentally to become, either itself or the navigation company for it and under its authority, a proprietor of riparian rights. In such case, therefore, it may, to the extent of its proprietary right so acquired, exercise control of such water power and reserve a benefit therefrom and from the revenues thereof.

Water Power Dams Distinguished.

It is not correct, however, to assert that in the case of all dams built across navigable streams, "the Federal government may impose a charge for the use of surplus water not needed for navigation." This is the assertion of Senator Burton in his committee report on the Connecticut river bill, and substantially the same assertion is made by the Secretary of War when he asserts that the Federal government has a "proprietary interest in the water power" developed by all structures built in the aid of navigation and by structures built with government consent by a private enterprise for water power purposes across navigable streams.

The Secretary of War and Senator Burton refer to this question as "settled" by the decision in Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97, 173 U. S. 190, 43 L. ed. 663, 19 Sup. Ct. Rep. 316. An examination of this case shows clearly that it does not support any such contention. It is true that it was held in that case that the water power created by the dam in question was incidental to the navigation improvement and was sub-

ject to the control and appropriation by the United States; but such power of control in the United States was not based either upon the fact that it was a navigation dam, or upon the fact that the water power in question was created incidentally to a navigation improvement. The conclusion in that decision was based expressly upon the fact that, by reason of certain conveyances from the private owners of the water power in question to the United States and confirmed by state legislation, both the private right and the right of the state had passed to the United States as proprietor.

It has never been settled by any Federal decision that the government could appropriate to itself, or for its benefit, revenues from water power, by virtue of a right arising solely from its constitutional power to regulate navigation, nor in any other case except where it had acquired the proprietary rights of either the individual riparian owner or of the state, or of both.

But the present controversy involves a class of dams and of rights different from those involved in connection with the building of purely navigation dams, where the water power created is merely incidental. The progress in the science of transmission of power by electricity has made feasible the development of water powers which have long lain dormant, and riparian owners of such water powers are now induced to develop as private business enterprises. The present Federal dam acts, the authority for which is based solely upon the power of the Congress to regulate commerce, that is, in this case navigation, require the consent of the Congress to the building of such dams across navigable streams, which requirement for consent is authorized solely on the ground that Congress may, by the consenting act, prevent, so far as reasonably possible, the dam from becoming an unnecessary interference with navigation. So the plans for the structure must be approved by the Secretary of War and Chief of Engineers, whose duty it is to make the plans conform to present and future navigation purposes. By such acts also the dam, while essentially a water power dam, is made incidentally a navigation improvement, with the obligation upon the dam owner to construct and maintain for the government locks for boats, and even to furnish power for operating the same. In such cases the navigation facilities are incidental, and the burdens either arbitrarily imposed upon, or consented to by, the dam owner, are a recognition of the rights of the government in its sovereign capacity to control and protect navigation, and often include concessions by the dam owner beyond the obligations which could lawfully be imposed upon him. But the proprietary interest in the water power still remains in the riparian owner, who himself or whose grantees own the water power and the dam and the improvements.

In such cases there is no constitutional basis for a claim of right on the part of the government to appropriate to itself either the water power or revenues from the water power. It has no right, and such right has never been asserted by any court, to impose charges upon the water power owner.

Consent of Congress Is Exercise of a Limited Supervisory Power.

When the owner of the riparian rights seeks to develop them by a dam across a navigable stream, and asks the consent of Congress therefor, the duties and power of Congress are limited by what is necessary to prevent the dam from being an unreasonable interference with navigation. That is the limit of Federal power in that connection. Congress has not the power arbitrarily to refuse such consent. It has no power to impose conditions and obligations beyond the scope of those which are within its limited and defined powers as sovereign, expressly reserved to the Federal government,—to regulate navigation. All other rights and powers belong to the states, and, so far as the states have made it a law of private property right, to the individual riparian.

Certain advocates of a proprietary interest in the Federal government seem to have been impressed with the rules of law here stated, which they cannot controvert. But they seem to think that by a juggling of words they may, by a sort of subterfuge, procure for the Federal

government rights which, under the Constitution, do not belong to it. Accordingly, they pretend to view every dam across a navigable stream, however manifestly a purely water power project, as a navigation dam; and this, too, even in instances where the physical conditions are such that there is no present or prospective navigation use. They even assert that the Congress has, under the Constitution, the right arbitrarily to refuse consent for power dam structures, and that, having such arbitrary power, it may impose any conditions including that of revenue charges. This attitude is not that of a judicial legislator, but rather that of one who sets out, defying constitutional limitations, to use a ministerial or supervisory power of the Federal government as a threat or means of extortion. Such attitude and methods are attempted to be justified as a means to conserve what in the end is asserted to be for the public interest. But confiscation, however adroitly accomplished, of the rights of a state or of the property rights of individual owners, cannot be justified on the ground merely that it brings the Federal government something more of revenue. Those who favor an extended exercise of Federal proprietorship in these matters are thereby urging an encroachment by the Federal government upon the rights of the states and of private riparian owners, in the same way that certain state legislators are attempting an invasion by the state of a private property right of the private riparian owner, by ignoring the difference between conservation and confiscation.

It is evident that in the Connecticut River Company case, all proprietary interest in the water power and its revenues belong either to the state or the company; and that, whether they belong to the state or the company, is a question which depends on the rule concerning such property rights as fixed by the law of the state. It is further evident that such property rights, so fixed, cannot be affected by any act or fiat of the Congress in derogation of the same. So far as the Federal government is concerned, however, it manifestly has no proprietary right in the water power, and has no authority to legislate to itself any revenues therefrom.

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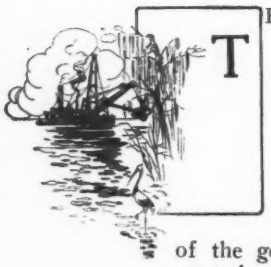
All over the country there are vast reservoirs of wealth the existence of which nobody knew when lands were settled under the homestead act, when lands were purchased and when lands were granted; and while we must preserve the rights of the owners, yet so far as those rights are subject to lawful control, so far as those rights are subject to laws that existed when the titles were acquired, to laws under which the titles are held, so far we ought to see that by the application of those laws in lawful ways and without taking away anybody's right we give to the whole people of the United States such benefit from this great new work as they may lawfully have.

—*Hon. Elihu Root.*

Governmental Diversion of Nontidal Waters

BY GEORGE J. COUCH



THE questions, How far does the public own the water in nontidal streams? and, if it has title, What is the result of that ownership as regards the right of the government to divert the waters from their natural channel?—are undoubtedly of growing importance. This increasing importance may be attributed largely to the increasing population of the country and its centralization in the cities, thereby necessitating not only improvement of the transportation facilities, but the generation of power, for which, it would seem that in the not distant future, reliance must be put upon our natural resources, chief among which is our immense water power, the extent and importance of which does not as yet seem to have been generally realized. Then, again, there is the weighty question of an adequate water supply for our centers of population, recourse for which is in most instances made to our natural streams. Other important questions involve the right to divert water for the purposes of irrigation, drainage, etc.

In approaching these questions it may be well to state some of the fundamental principles involved in a settlement thereof. In the first place the owner of land bordering on a stream has, because of the relation of the water to his land, certain property rights, interference with which, except in exceptional cases, seems to be controlled by the constitutional provisions preventing the taking of property without compensation and due process of law.

Then, there is the question of the ownership of the bed of the stream and of the waters themselves. At common law the title to the beds and waters of all nontidal streams was in the riparian owner,[1] while under the civil law, which declared that running water was common to all men by the law of nature,[2] which statement has been construed in America at least to mean that the title to the soil of running streams was in the public,[3] a contrary conclusion obtains. But this interpretation has been criticized as not justified by the facts;[4] and some writers adhere to the rule that the Justinian law was that the title to such streams was in the riparian owner, and that the public interest was simply the right to use.

The importance of determining the title to the bed and waters of the stream lies in the fact that the decisions in most cases are made to depend upon the answer to that question; it being generally held that where the title to the bed of the stream is in the riparian proprietor, any diversion of the waters thereof for public use constitutes a taking which requires compensation; and that where the title to the stream, including its bed, is in the state, for some public purposes at least, such waters may be diverted without liability to a riparian owner thereby deprived of the normal flow of the stream.

Further confusion among the decisions is attributable to the fact that many courts have confused the common-law test of public ownership; to wit, presence of tide, with navigability. In those ju-

[1] Lord Hale, De Jure Moris, chapter 1.

[2] Justinian's Institutes, Liber 2, Title 1, § 1; Wood, Civil Law, 82; Taylor, Roman Law, 246.

[3] Canal Appraisers v. People, 17 Wend. 571.

[4] 1 Farnham, Waters, p. 240.

risdictions a marked distinction is drawn between streams which are navigable and those which are not, in respect to the property which riparian owners may have in them. In a navigable stream the bed and waters are held to belong to the state; while in non-navigable streams the owners of the bank own to the thread of the stream, or, if both banks, the entire bed; and in addition have a qualified ownership in the water itself. All streams navigable in fact are navigable in law, both under the common and civil law systems; and therefore if navigability is made the test of public right, the public may take the water from most streams without compensation. This is contrary to the common-law rule, but by the civil-law rule, where, as before stated, running water was regarded as common property, applied directly, the public might take such water as it needed without compensating anyone for it.

In some states the streams which are actually navigable are declared vested in the people by express constitutional provision; but such provisions do not affect vested rights. And in some states the general question of the extent of the right of the state, acting through its legislature as representatives of the people, to divert the waters of a navigable stream, as against the objection of vested interest, is regulated by statutory provision; but in most cases both the Constitutions and legislatures are silent upon the subject.

In those jurisdictions which determine the rights of the state according to the navigability or non-navigability of the stream, the weight of authority, as above stated, is to the effect that in non-navigable streams water cannot be diverted by the state, even for public purposes, without compensating riparian owners thereby deprived of the right to use the diverted water. But a fuller understanding of the law upon the subject can be better gained by an examination of the cases, than can be conveyed by a general discussion of the principles involved, the more important decisions being collated and discussed in the following subdivisions of this article.

Diversion for Navigation Purposes.

To avoid confusion it should be remembered that the writer is not dealing with cases in which it appears that the waters were diverted in improving the navigability of the streams in which they naturally flow, but rather with that class of cases in which the waters were diverted from their natural channels for the purpose of being used elsewhere.

As illustrative of the distinction between the class of cases treated herein and that class excluded, a very instructive case is that of Beidler v. Sanitary District,[5] wherein it was held that the right of the public to improve navigation without liability for the consequential injuries does not include the right to take the water of a nontidal stream of which the owner of the bank is also the owner of the bed, to supply an artificial channel or canal. In this case it was contended that the title of a riparian owner is subordinate to such use of the water as may be consistent with or demanded by the public right of navigation, and subject to the paramount right of the state to make any and all improvements to facilitate navigation; but the court, speaking through Scott, J., said that such right did not extend to the making navigable of an artificial channel, which, in effect, was a holding that such principle was applicable only in case the improvement was for the purpose of facilitating the navigability of a channel in which the water naturally flowed, or some stream or body of water naturally emptying into it or into which it emptied.

Another very important decision which adopts the rule that the right of a state to use the bed and waters of a nontidal stream for the improvement of navigation does not extend to the diverting of the waters from the stream to an artificial channel constructed not for the improvement of the navigation of the stream, but as a separate navigable water way; and that if it attempts to do so it must make compensation to the riparian owner for the injury thereby caused him, —is Fulton Light Heat & P. Co. v. State.[6] This rule, which is seemingly the better

[5] 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118.
[6] 200 N. Y. 400, 37 L.R.A.(N.S.) 307, 94 N. E. 199.

one, is supported by several decisions in the Federal courts,[7] as well as by the courts of Illinois,[8] Ohio,[9] and New York.[10]

But in a number of jurisdictions the courts, following what is supposed to be the civil-law rule, but which was in fact established by the Code Napoleon, have held that the same principles apply to fresh-water streams which are actually navigable, as the jurisdictions adhering to common-law principles apply to tide waters; namely, that the state may divert such waters for public purposes, such as navigation, without compensation, except in case of interference with vested rights. Notable among the decisions so holding is the Mississippi case of Homochitto River v. Withers,[11] wherein the court rejected the theory that the state can do nothing which will cause a diversion of a public water course not a tidal stream, and adopted the doctrine that fresh-water streams which are actually navigable are subject to the paramount right of the state to control and dispose of the waters thereof in which the riparian owners have a qualified right for public purposes, without violating the constitutional provision against taking property. Applying this doctrine, it was held that the state can entirely absorb a navigable nontidal stream by diverting its waters into a canal constructed to promote and facilitate navigation, without liability to a riparian owner thereby deprived of all benefit formerly derived from the river; but this decision has been commented upon adversely,[12] it being said that the court had been misled by the apparent force of certain cases which seem to imply a right to destroy the rights of riparian owners, but which in fact had no such force. It might also be worthy of note that the rule that the right of the public was superior to that of the individual, and that the individual might be made to suffer loss for the public, was changed in Mississippi by constitutional provision[13] which made the right of the owner of private property superior to that of the public, wherefore he may now be compelled to part with his property only by full payment for it or any right in relation to it.

So, the court of appeals of New York in an early case[14] involving riparian rights on the Mohawk river, a fresh-water stream, said that the surrounding territory had been settled under the civil law by the Dutch, and applied to it the rule of the Code Napoleon, to the effect that the title to its bed was in the people, which is contrary to the rule as laid down by the Dutch writer Vinnius,[15] and held that because of that fact the waters of the river belong to the people, and could be diverted for canal purposes without compensating damaged riparian owners; but Chancellor Kent's rule of navigability, that is, presence or absence of tide, was later adopted[16] as to all fresh-water streams in New York state except the Mohawk and the Hudson rivers, and the decision above referred to held applicable to such rivers only.

And the civil law as adopted in Pennsylvania, under which her navigable fresh-water streams are treated as belonging to the public, has been held to authorize the diversion of the waters thereof for canal purposes without the necessity of compensating either riparian owners or licensees of water power on such rivers.[17]

Diversion for Power Purposes.

The Ohio courts have adopted the rule that waters cannot be taken by canal commissioners from a private stream to

[7] Cohen v. United States, 162 Fed. 364; Avery v. Fox, 1 Abb. U. S. 246, Fed. Cas. No. 674; Lowndes v. United States, 105 Fed. 838.

[8] Beidler v. Sanitary District, 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118.

[9] Cooper v. Williams, 5 Ohio, 391, 24 Am. Dec. 299, affirming 4 Ohio, 253, 22 Am. Dec. 745.

[10] Fulton Light, Heat & P. Co. v. State, 200 N. Y. 400, 37 L.R.A.(N.S.) 307, 94 N. E. 199; Canal Fund Comrs. v. Kempshall, 26 Wend. 404; Ex parte Jennings, 6 Cow. 518, 16 Am. Dec. 447.

[11] 29 Miss. 21, 64 Am. Dec. 126.

[12] 1 Farnham, Waters, p. 404.

[13] Constitution 1890, § 17.

[14] People ex rel. Loomis v. Canal Appraisers, 33 N. Y. 461.

[15] See Farnham, Waters, p. 240.

[16] Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

[17] Rundle v. Delaware & R. Canal Co. 14 How. 80, 14 L. ed. 335; Susquehanna Canal Co. v. Wright, 9 Watts & S. 9, 42 Am. Dec. 312.

be leased or sold for the benefit of the state to private parties for power purposes, even though the commissioners were authorized to take waters therefrom for canal purposes upon making compensation.[18] In arriving at this conclusion the supreme court said: "The state, notwithstanding the sovereignty of her character, can take only sufficient water, from private streams, for the purposes of the canal. So far the law authorizes the commissioners to invade private rights as to take what may be necessary for canal navigation, and to this extent, authority is conferred by the Constitution, provided a compensation be paid in money to the owner. The principle is founded on the superior claims of a whole community over an individual citizen; but then in those cases only where private property is wanted for public use, or demanded by the public welfare. We know of no instances in which it has or can be taken, even by state authority, for the mere purpose of raising a revenue by resale or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state." [19]

On the other hand, it has been held in Wisconsin [20] that the state may grant the right to divert water from a navigable stream for power purposes without compensation to lower riparian owners, where the water power was created by an improvement by the state of the stream; the ground of the decision being that in such a case the surplus water power over that required for navigation was merely incidental to the improvement.

Diversion for Highway Purposes.

Iowa seems to be the only state in which the question under discussion has arisen in connection with a diversion of the water of a nontidal stream for highway purposes, and there [21] the general rule that a riparian owner cannot be deprived of a portion of a nontidal stream through diversion by the state, its political subdivisions, or officers, without compensation, was recognized, where water was diverted through an artificial channel by a road supervisor in constructing a highway crossing over a stream.

Diversion by Railway.

Likewise but one case [22] seems to have arisen which involves the diversion of water from a stream by a railway, it being held that the adoption of the constitutional provision making all flowing streams and natural water courses the property of the state for mining, irrigation, and manufacturing purposes after the territory had been settled under the principles of the common law, which vested the streams of the territory in the owners of the lands through which they flowed, did not deprive the riparian owners of the right to have the water flow in its natural bed, in view of the 14th Amendment to the Federal Constitution, which protects property against all state action that does not constitute due process of law, so as to allow a railroad company having power to take property by eminent-domain proceedings to divert a stream from the lands through which it flowed without compensating the injured riparian owners. Continuing, the court said that if such constitutional provision had had the effect of taking streams which had become vested in private persons without compensation, it would have itself contravened the Federal Amendment above referred to.

Diversion for Drainage Purposes.

Neither a state nor its political subdivisions can divert water from streams for drainage purposes without compensating riparian owners injured by the diversion,[23] nor can the legislature of a state authorize a drainage district to destroy even a navigable river without compensation, where the title to the bed of the

[18] Cooper v. Williams, 5 Ohio, 391, 24 Am. Dec. 299, affirming 4 Ohio, 253, 22 Am. Dec. 745; Buckingham v. Smith, 10 Ohio, 288.

[19] Buckingham v. Smith, 10 Ohio, 288.

[20] Green Bay & M. Canal Co. v. Kaukauna Water Power Co. 70 Wis. 635, 35 N. W. 529, 36 N. W. 828, affirmed in 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

[21] McCord v. High, 24 Iowa, 336.

[22] Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

[23] Stevens v. Worcester, 196 Mass. 145, 81 N. E. 907.

stream is in the state in trust, as the state cannot abdicate such a trust.[24] And a public corporation authorized to provide a drainage district cannot contest its liability to compensate for injuries done to riparian owners by diverting water from a navigable stream to supply its ditch, upon the ground that incidentally it has created a navigable channel, and that the public is not liable for injuries to riparian owners in consequence of the improvement of navigation;[25] but where the diversion by the state, or a corporation to which it has delegated its powers, is with the consent and to the advantage of the riparian owners affected, the diversion does not amount to an exercise of the power of eminent domain.[26]

Diversion for Irrigation Purposes.

Rules similar to those applied in the foregoing cases seem applicable to diversions for purposes of irrigation which is conceded to be a public purpose. Thus, an act authorizing an irrigation company to appropriate the waters of natural streams in arid districts for the purposes of irrigation, domestic use, and other beneficial purposes, to the exclusion of other riparian owners, for any but domestic use, without providing compensation, violates the constitutional provision against taking property without compensation;[27] but such an act, if limited to apply only to streams upon the public lands of the state, would seem to be valid.[28] And that irrigation is essential to successful agriculture in arid portions of a state does not authorize the legislature to abolish vested riparian rights by authorizing the appropriation of public waters for irrigation, except as such rights are taken or impaired in an exercise of the power of eminent domain, in which case compensation must be made.[29] Nor does the fact that a charter authorizes a canal company to "acquire" water privileges for purposes of irrigation in arid districts confer a right to use the water of non-navigable streams to the injury of riparian owners without making compensation.[30]

Diversion for Water-Supply Purposes—in General.

There is some conflict among the authorities as to whether or not nontidal waters may be diverted for the purpose of furnishing a municipality and its inhabitants with water for domestic use, without compensating injured riparian owners, but the great weight of authority[31] denies such a right. And the fact

[24] Re Dancy Drainage Dist. 129 Wis. 129, 108 N. W. 202.

[25] Beidler v. Sanitary Dist. 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118.

[26] Murphy v. Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345, holding that the diversion of the water for sanitary purposes of a small, unbeneficial water course, by a city through which it flowed, where made with the consent of the affected riparian proprietors, and for their benefit, was not an exercise of the power of eminent domain.

[27] Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S. W. 758.

[28] Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

[29] Crawford Co. v. Hathaway (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 781.

[30] Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

[31] Pine v. New York, 103 Fed. 337, affirmed in 50 C. C. A. 145, 112 Fed. 98, and reversed on other grounds in 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Ulbricht v. Eufaula Water Co. 86 Ala. 587, 4 L.R.A. 572, 11 Am. St. Rep. 72, 6 So. 78; Beckerle v. Danbury, 80 Conn. 124, 67 Atl. 371; Oelschleger v. Boston, 200 Mass. 425, 86 N. E. 883; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366; Higgins v. Flemington Water Co. 36 N. J. Eq. 538; Gilzinger v. Saugerties Water Co. 66 Hun, 173, 21 N. Y. Supp. 121, affirmed without opinion in 142 N. Y. 633, 37 N. E. 566 (non-navigable stream); Standen v. New Rochelle Water Co. 91 Hun, 272, 36 N. Y. Supp. 92; Sumner v. (non-navigable stream) Gloversville, 35 Misc. 523, 71 N. Y. Supp. 1088, holding, however, that the amount must be material; Fischer v. Clifton Springs, 121 N. Y. Supp. 163, affirmed without opinion in 140 App. Div. 918, 125 N. Y. Supp. 1119; Gallagher v. Kingston Water Co. 25 App. Div. 82, 49 N. Y. Supp. 250; Gray v. Ft. Plain, 105 App. Div. 215, 94 N. Y. Supp. 698; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Ehrgood v. Moscow Water Co. 4 Lack. Legal News, 151; Heckscher v. Shenandoah Citizens' Water & Gas Co. 2 Legal Chron. 273, affirmed in Shenandoah Co's Appeal, 2 W. N. C. 46 (non-navigable stream); Reading v. Althouse, 93 Pa. 400; Lycoming Gas & Water Co. v. Moyer, 99 Pa. 615; Haupt's Appeal, 125 Pa. 211, 3 L.R.A. 536, 17 Atl. 436; Leonard v. Rutland, 66 Vt. 105, 28 Atl. 885; Rigney v. Tacoma Light & Water Co. 9 Wash. 576, 26 L.R.A. 425, 38 Pac. 147; Swindon Waterworks Co. v. Wiltz & B. Canal Nav. Co. L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284, 22 Eng. Rul. Cas. 226.

that a municipal corporation owns land upon a stream gives it no right to divert water from the stream to the injury of other riparian owners, in sufficient quantities to supply the domestic wants of its inhabitants, where the city itself is not located upon the stream,[32] although this opinion has not been universally accepted.[33]

And the better rule is that a state cannot absorb a stream for municipal purposes even when located upon its banks.[34] And the fact that a city is a riparian owner does not authorize it to divert from the stream a sufficient amount of water to accommodate and meet the necessities of irrigation, cooking, laundry, sanitation, etc., for a state farm, penitentiary, and asylum where many persons are confined.[35] A different conclusion, however, has been reached in a few instances where the municipality itself was located upon the banks of the stream. Thus, under the Mexican and Spanish laws, Mexican pueblos were entitled to so much of the water flowing through the pueblos as was necessary for the municipal and domestic purposes of the pueblo, and this right was superior to the rights of the riparian proprietors, and vested in the cities which became the successors of such pueblos,[36] but this preferential right of the Mexican pueblos to the waters in a stream could be asserted only to the amount needed to supply the wants of the inhabitants, so that a city, as the successor of a pueblo, cannot sell water for use on extramunicipal nonriparian lands to the injury of the riparian proprietors.[37] And in Ohio the courts adhere to the rule that a city situated on a stream may supply water to its inhabitants for domestic use without compensating a lower proprietor who has been using the water of the stream for power purposes,[38] but it seems that, even in Ohio, this rule does not apply where the municipality is not located on the stream but merely owns a tract of land thereon;[39] and the city cannot materially diminish the flow of the stream by supplying water to parties outside of such city, or by supplying to manufacturers for power purposes more than a reasonable share of the water, considering all of the circumstances.[40] So, in Vermont it has been held[41] that dwellers in towns and villages watered by a stream may use the water for domestic purposes,

[32] Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; Ulbricht v. Eufaula Water Co. 86 Ala. 587, 4 L.R.A. 572, 11 Am. St. Rep. 72, 6 So. 78; Harding v. Stamford Water Co. 41 Conn. 87; Osborn v. Norwalk, 77 Conn. 663, 60 Atl. 645; Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; Ætna Mills v. Waltham, 126 Mass. 422; Hall v. Ionia, 38 Mich. 493; Jones v. Portsmouth Aqueduct, 62 N. H. 488; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367, 41 Atl. 385, affirmed on this point in 60 N. J. Eq. 399, 45 Atl. 596; Warder v. Springfield, 9 Ohio Dec. Reprint, 855; Craig v. Shippensburg, 7 Pa. Super. Ct. 526; Irving v. Media, 10 Pa. Super. Ct. 132, affirmed on opinion below in 194 Pa. 648, 45 Atl. 482; Lord v. Meadville Water Co. 135 Pa. 122, 8 L.R.A. 202, 20 Am. St. Rep. 864, 19 Atl. 1007; Lonsdale Co. v. Woonsocket, 25 R. I. 428, 56 Atl. 448; Roberts v. Gwyrfai Dist. Council [1899] 2 Ch. 608, 68 L. J. Ch. N. S. 757, 64 J. P. 52, 48 Week. Rep. 51, 81 L. T. N. S. 465, 16 Times L. R. 2, 25 Eng. Rul. Cas. 401, affirming [1899] 1 Ch. 583, 68 L. J. Ch. N. S. 233, 63 J. P. 181, 47 Week. Rep. 376, 80 L. T. N. S. 107, 15 Times L. R. 165; Swindon Waterworks Co. v. Wiltz & B. Canal Nav. Co. L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284, 22 Eng. Rul. Cas. 226.

[33] Elgin v. Elgin Hydraulic Co. 85 Ill. App. 182, affirmed in 194 Ill. 476, 62 N. E. 929, wherein it was said that a municipal corporation by buying a small plat of land on the bank of a river became a riparian owner, and could divert its proportionate share of the waters. (This expression of opinion, however, was *obiter*, as the decision really turned upon the fact that the party contesting the city's alleged right to divert the water was not an interested riparian proprietor.)

[34] New Whatchom v. Fairhaven Land Co. 24 Wash. 493, 54 L.R.A. 190, 64 Pac. 735.

[35] Salem Flouring Mills v. Lord, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832. But see Filbert v. Dechert, 22 Pa. Super. Ct. 362.

[36] Vernon Irrig. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762.

[37] Vernon Irrig. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; Feliz v. Los Angeles, 58 Cal. 73.

[38] Canton v. Shock, 66 Ohio St. 19, 58 L.R.A. 637, 90 Am. St. Rep. 557, 63 N. E. 600.

[39] Warder v. Springfield, 9 Ohio Dec. Reprint, 855.

[40] Canton v. Shock, 66 Ohio St. 19, 58 L.R.A. 637, 90 Am. St. Rep. 557, 63 N. E. 600.

[41] Barre Water Co. v. Carnes, 65 Vt. 626, 21 L.R.A. 769, 36 Am. St. Rep. 891, 27 Atl. 609. But see Leonard v. Rutland, 66 Vt. 105, 28 Atl. 885.

to the same extent that a riparian owner can, provided they can reach the stream by a public highway or secure a right of way over the lands of others; it being said that they can either go to the stream and there use the water, or convey it to their homes, either individually or collectively, by means of pipes, and there use it for their several interests, to the same extent that they could if it flowed past their dwellings in a natural channel.

But where the waters are diverted from a public or navigable stream,—and by public or navigable stream is here meant all streams that are actually navigable,—it seems that municipalities may take a water supply without compensating all riparian owners;[42] the right being based upon the reasoning that where a stream is public the rights of the riparian owners are subordinate to public uses of such water, and that the right to draw a supply of water for the ordinary uses of a city is such a public use.

Constitutional and Statutory Provisions.

As before stated, there are a number of states which have a constitutional or statutory provision which attempts to define the relative rights of the state and the riparian owners in its streams. In at least one state, title is declared vested in the pubic, with an express reservation to riparian owners of vested rights,[43] while in another the Constitution merely makes all flowing streams and natural water courses the property of the state,[44] but in the latter case the provision, if taken broadly, would seem to be unconstitutional as impairing vested rights. The question how far vested common-law rights of riparian owners may be interfered with by the adoption of a state Constitution is one which has received little attention in the courts. The only apparent obstacle in the way of assertion by a state of title to its nontidal waters is the provision of the Federal Constitution, that no state shall deprive any citizen of his property without due process of law; but the United States Supreme Court has never directly passed upon the question whether or not a state, through its Constitution, could so assert title to its waters as against riparian owners, although from the position taken in several cases[45] it may be implied that it would not regard such a provision as due process of law, and that it would, if called upon, exercise its authority to prevent a confiscation of vested riparian rights by that means. A few state decisions[46] have sanctioned the destruction of riparian rights without considering the constitutionality of the question, merely looking to the state Constitution as the final authority; but such cases cannot be regarded as authority for the validity of a constitutional provision asserting a state right in the public waters of the state.

But passing to the immediate question under discussion, which is, as to the effect of constitutional and statutory provisions upon the right of a municipality to divert water for municipal purposes, we find that constitutional declarations that the waters of streams not theretofore appropriated are the property of the public, subject to be appropriated, and that those using the waters for domestic purposes shall have preference over those claiming for any other purpose, does not authorize a city either to divert water without compensation, as against rights acquired previous to the adoption of the Constitution,[47] or as against rights

[42] Minneapolis Mill Co. v. Water Comrs. 56 Minn. 485, 58 N. W. 33, affirmed in 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; Crill v. Rome, 47 How. Pr. 398; Taggart v. Jaffrey, 75 N. H. 473, 28 L.R.A.(N.S.) 1050, 76 Atl. 123.

[43] See Madison v. Spokane Valley Land & Water Co. 40 Wash. 414, 6 L.R.A.(N.S.) 257, 82 Pac. 718.

[44] See Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

[45] Smyth v. Ames, 169 U. S. 525, 42 L. ed. 842, 18 Sup. Ct. Rep. 418; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Louisville & N. R. Co. v. Kentucky, 183 U. S. 511, 46 L. ed. 304, 22 Sup. Ct. Rep. 95, and Houston & T. C. R. Co. v. Texas, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. Rep. 610.

[46] Ft. Morgan Land & Canal Co. v. South Platte Ditch Co. 18 Colo. 1, 36 Am. St. Rep. 259, 30 Pac. 1032; Moyer v. Preston, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845; Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; Smith v. Denniff, 24 Mont. 20, 50 L.R.A. 741, 81 Am. St. Rep. 408, 60 Pac. 398.

[47] Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313.

acquired subsequent to the adoption of the Constitution, but prior to the attempt of the city to appropriate the waters for the domestic use of its inhabitants;[48] nor does such a provision give a city a right to divert water for the use of its inhabitants, superior to the right of an individual or a farming community to divert water for domestic or other beneficial purposes, in the sense that the city can destroy rights previously acquired without compensating the senior appropriator.[49]

So, any legislative attempt, in authorizing the appropriation of water for municipal uses, to limit the right to compensation to those only whose rights in the water vested prior to the passage of the statute, impairs constitutional property rights which vest after such passage, but prior to the attempt of a municipal corporation to appropriate the waters of a stream;[50] and a statute attempting to authorize a corporation to take water from a river, which provides that no party shall be entitled to any damages because of any diversion, would be clearly unconstitutional[51] where there are riparian proprietors who have vested rights. And a mere legislative authorization, without mention of compensation, to divert the waters of a stream for domestic use by the inhabitants of a city, does not authorize it to do so to the injury of riparian owners, unless compensation be made,[52] there being no distinction between an individual and a municipal corporation acting under legislative authority.[53] Nor does a mere legislative grant of an exclusive right to conduct to and furnish a city with water for domestic purposes confer a right upon the grantee to divert the water of a nontidal stream to the injury of riparian proprietors, although for such a public use, without making compensation therefor, especially where the statute contains nothing from which the intention of the legislature to give the use of the water can legitimately be inferred;[54] nor does the fact that a corporation is chartered for the purpose of supplying, and is under contract to supply, a municipality and its inhabitants with water, give the corporation any right to use or appropriate the waters of a natural stream without compensating riparian owners;[55] and the same rule would apply both to private companies[56] incorporated for the purpose of furnishing a municipality with water, and to private individuals[57] under contract to furnish a city with water, as would apply to the municipality itself.

And, of course, where there is statutory authority to divert water from a stream, a taking thereunder cannot be justified where the statutory requirements have not been complied with.[58]

Geo. J. Couch

[48] Sterling v. Pawnee Ditch Extension Co. 42 Colo. 421, 15 L.R.A.(N.S.) 238, 94 Pac. 339; Montpelier Mill. Co. v. Montpelier, 19 Idaho, 212, 113 Pac. 741.

[49] Sterling v. Pawnee Ditch Extension Co. 42 Colo. 421, 15 L.R.A.(N.S.) 238, 94 Pac. 339.

[50] Sterling v. Pawnee Ditch Extension Co. 42 Colo. 421, 15 L.R.A.(N.S.) 238, 94 Pac. 339.

[51] Harding v. Stamford Water Co. 41 Conn. 87; Hough v. Doylestown, 4 Brewst. (Pa.) 333.

[52] Hough v. Doylestown, 4 Brewst. (Pa.) 333; Roberts v. Gwyrfai Dist. Council [1899] 2 Ch. 608, 68 L. J. Ch. N. S. 757, 64 J. P. 52, 48 Week. Rep. 51, 81 L. T. N. S. 465, 16 Times L. R. 2, 25 Eng. Rul. Cas. 401, affirming [1899] 1 Ch. 583, 68 L. J. Ch. N. S. 233, 63 J. N. 181, 47 Week. Rep. 376, 80 L. T. N. S. 107, 15 Times L. R. 165.

[53] Hough v. Doylestown, 4 Brewst. (Pa.) 333.

[54] Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; Stein v. Ashby, 24 Ala. 521; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758.

[55] Tampa Waterworks Co. v. Cline, 37 Fla. 586, 33 L.R.A. 376, 53 Am. St. Rep. 262, 20 So. 780.

[56] Saunders v. Bluefield Waterworks & Improv. Co. 58 Fed. 133, reversed for want of jurisdiction in 11 C. C. A. 232, 25 U. S. App. 70, 63 Fed. 333; Standard Plate Glass Co. v. Butler Water Co. 5 Pa. Super. Ct. 563; Philadelphia & R. R. Co. v. Pottsville Water Co. 182 Pa. 418, 38 Atl. 404.

[57] Howe v. Norman, 13 R. I. 488.

[58] Lund v. New Bedford, 121 Mass. 286.

Percolating Water and the Common Law

BY HENRY P. FARNHAM, M.L.

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THE common law consists of principles of justice for the regulation of human relations. For the most part it is found in customs or maxims which have been recognized as just, or in judicial decisions in concrete cases which have been accepted and acted upon. There are, however, continually arising questions growing out of new or changing relations to which no custom, maxim, or decision directly applies, and which must, therefore, be solved by the rule of justice as drawn from the customs, maxims, and decisions which have been applied in the most nearly analogous cases.

About the middle of the last century the question arose as to rights in water which was hidden below the surface of the earth. A variety of conditions had combined to hinder this question from arising earlier. The large landed estates in England made conflict between adjoining landowners impossible, and science had not advanced far enough to demonstrate the necessity of water for sanitary purposes, while abundant rainfall made it unnecessary to rely for agricultural purposes upon water found below the surface. But with the advance of sanitation, which condemned the private well and recommended the public municipal water supply, the settlements in the more arid climates in some parts of this country and the smaller divisions of the landed estates here, conflicts arose over the right to the water with which the earth was more or less saturated. The first case came before the English courts in the year 1840. The English law was very tender of the rights of the private owner, and had a maxim to the effect that the title of such owner extended from the center of the earth to the zenith, and that the owner had absolute dominion over everything found within his domain. When the great case of Chasemore v. Richards [1] came before the House of Lords, this was the maxim which was applied; and the court held that, percolating water being a part of the earth, a surface owner could do anything he wished with it so long as he operated within his own borders and did not interfere with a stream flowing underground, the course of which could be traced. And this doctrine was carried to the extent in New River Co. v. Johnson, 2 El. & El. 435, of holding that a land-owner could abstract water from his soil for sale to a distant municipal corporation, although the effect was to destroy the wells in the neighborhood. This was an easy rule to apply. It saved the court much perplexity and anxious thought, but it was not just, and because of its want of justice it was not law.

There was another maxim which was of equal force with the one applied, which was temporarily overlooked. This was, that a man must so use his own as not to injure his neighbor. This had placed some very serious restrictions upon the use which could be made of real estate. A landowner could not remove the soil within his borders if the result was to disturb his neighbor's soil. He could not create a condition on his property which would constitute a nuisance to his neighbor. The doctrine of ancient lights was recognized. If several parcels overlaid a saturated stratum, and the owner of one of them drew the

[1] 7 H. L. Cas. 349, 1 Eng. Rul. Cas. 729.

waters within his borders in sufficient quantities he withdrew the lateral support which kept the adjoining strata saturated and permitted the water from it to flow into his property. He thereby accomplished with respect to the water what the court had ruled he could not do with respect to the soil. If he placed foul material upon the surface of his land, or in pits, so as to pollute the percolating water which found its way to his neighbor's property, he created a nuisance, which he was not allowed to do upon the surface. These matters were not sufficiently considered in Chasemore v. Richards, which held that water might be pumped in enormous quantities from a well, even though the effect was to interfere with the source of a surface river and affect the rights of a riparian owner. The text writers, however, accepted the high authority of the House of Lords without giving the matter independent investigation, and the books appearing shortly after that time, therefore, state the law to be that a property owner could do as he pleased with the water under the surface within his boundaries, so long as he did not interfere with an underground stream the course of which could be traced. But such a crude and narrow view of the subject could not long escape criticism. In fact in Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 Am. Dec. 179, which was decided only two years after Chasemore v. Richards, the court suggested that a man's right to appropriate percolating water in his own land is limited by the corresponding right of his neighbor, and extends only to a reasonable exercise of such right.

A very little consideration is sufficient to demonstrate that the rule of correlative rights must be the true one and, therefore, the common-law rule upon the subject. There is a saturated stratum lying beneath nearly the whole surface of the earth, and because of the unstable and wandering character of water, if the pitch of the stratum is right, the pollution of the subsurface water at one point may affect the health, or even imperil the lives of numbers of persons living along the course which the water naturally takes. The possibility of such injury has led the courts to hold that percolating water cannot be thus polluted. This doctrine has been recognized even in the English courts. Ballard v. Tomlinson, L. R. 29 Ch. Div. 115, 54 L. J. Ch. N. S. 454, 52 L. T. N. S. 942, 33 Week. Rep. 533, 49 J. P. 692.

Water is as necessary to life as is air or food. Neither animal nor plant can exist long without it. Nature has in the great saturated stratum of the earth's surface made provision for a continuous supply of water similar to the great reservoir of air above the surface; this reservoir is supplied in various ways. The chief source being the rain and snow precipitated on the surface from time to time. The rain and snow in certain countries at certain times provide moisture enough to supply life, but the reservoir is there to preserve the life between the showers. If the rain is withheld and the level of saturation falls even a few feet in some instances vegetation withers, the trees die, wells dry up, and the whole country resembles a desert where animal life cannot be supported. Can it be admitted that one landowner having access to this reservoir can for his own purpose draw the water from it until the point of saturation recedes below the danger point, any more than he would be permitted to destroy the air for the same purpose? The pertinency of this question is more apparent in an arid country like some of our western states, than where the rainfall is abundant, but the principle is applicable everywhere. There can be but one answer to the question, and that answer was given as soon as the question was presented to a court where arid conditions prevailed. The California court in the great case of Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L.R.A. 236, held that the use which any man can make of the water underneath his land must be determined by the needs of all others located over the same reservoir. It does not seem possible that the House of Lords could have made the ruling it did in Chasemore v. Richards if the consequences of the doctrine laid down by it had been sufficiently considered. A man owning a few rods of land could contract

to supply a city with water, and, while living in luxury and idleness on the profits of his contract, draw away the water from many miles of country, and could turn it into a desert, depriving prosperous tillers of the soil of their very means of subsistence, and that, too, by the use of material which nature furnished for their welfare as well as his. Of course, that is not the law. A few courts under the spell of Chasemore v. Richards and the texts founded on that decision have followed the rule of absolute right, but the later cases in which the consequences of such doctrine have been considered have almost without exception followed the true rule of correlative rights, while a few of the courts in which the erroneous rule was originally adopted have changed their ruling, and in view of the fact that courts exist to administer the law, and not error, it may be confidently predicted that the doctrine of absolute ownership and arbitrary right with respect to percolating water will soon be entirely a memory. To facilitate this it would be wise if writers and reviewers would cease to refer to the rule of Chasemore v. Richards as the common-law rule and then state that modern decisions are departing from it, and state the true rule as that of the common law, and, if necessary, refer to Chasemore v. Richards merely as an ill-considered opinion which has joined the derelicts together with many other mistakes which have resulted in the attempt to formulate rules for the administration of justice.

The rule of correlative rights does not mean that the quiescent owner can have the water left in its natural state, nor that he must not be put to any inconvenience. That would give him the advantage which has been denied to the active owner. It merely means that, taking into consideration all the facts in the case, the purpose of the intended use, and the needs of the locality each landowner must make such use of the water as is reasonable under the circumstances, permitting each to make the widest use possible without unnecessarily restricting or interfering with the common rights of all.

"When it is remembered that the first English case dealing with percolating water arose in 1840, and that it was not decided that the landowner might exhaust the water to furnish a municipal water supply until 1860, it will be at once seen that there was no English law on the subject at the time the common law was adopted by statute, in most of the American states, and that the opinion of the American courts as to what is the common law is as good as subsequent decisions in English courts. Therefore, in any case, the question can be decided on its merits, giving the English decisions the weight to which they are entitled, but without the necessity of regarding them as binding precedents."—*Farnham on Waters, vol. 3, p. 2718.*

Correlative Rights in Percolating Waters

BY L. A. WILDER

AN instance of the adjustment of the law to meet the demands of modern progress is shown in the gradual turning of the courts from the application of the maxim, *Damnum absque injuria* in controversies between landowners concerning the use of percolating waters, to the rule of correlative rights, by which each landowner is limited to a reasonable use. The ancient cases involving subterranean waters seem to have proceeded upon the assumption that the rules applicable to surface waters applied; and it is stated that a distinction between the two was first made in England in the case of Acton v. Blundell.[1] But the first English case dealing with percolating waters as distinguished from subterranean streams is said by Mr. Farnham[2] to have been decided in 1840.[3] The first case of the kind to come before the House of Lords was Chasemore v. Richards,[4] decided in 1859, and holding that the proprietor of a mill on a stream could not recover damages resulting from the sinking of a great well and the taking of water for the inhabitants of a town, thus intercepting percolating water which was the source of supply of a stream. This decision overruled Dickinson v. Grand Junction Canal Co.[5] and Balston v. Bensted.[6] The Chasemore Case, like others, laid stress upon the difficulty of determining the relative rights of landowners to water percolating underground, and having no certain course and no definite limit; and this difficulty, and the disinclination of the courts to meet it, is said by the author just referred to[7] to have resulted in conflicting statements, such as, on one hand, that percolating waters are of such uncertain quantity, and subject to such secret influences, that they should be kept and enjoyed absolutely by the owner of the land as one of its natural advantages;[8] and, on the other hand, that while such water is a mineral, it must be regarded as a mineral *feræ naturæ*, and that possession of the land is not necessarily possession of the mineral;[9] or, going still further, that the owner of the land has no rights in percolating water which the law can recognize.[10]

After observing that a statement that percolating water belongs absolutely to the owner of the land indicates a conception very different from one which states, there is no right in it which the law can recognize, that author says: "There is no reason why the use of such water should not be brought within definite rules the same as any other class of property. This has already been done to some extent with regard to water which is flowing in indefinite channels beneath the surface; and several recent de-

[1] 12 Mees & W. 324, 13 L. J. Exch. N. S. 289, 15 Mor. Min. Rep. 168. It is so stated in Dickinson v. Grand Junction Canal Co. 7 Exch. 300, 21 L. J. Exch. N. S. 241, 16 Jur. 200.

[2] Farnham, Waters, p. 2718.

[3] Hammond v. Hall, 10 Sim. 552, 4 Jur. 694.

[4] 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, affirming 2 Hurlst. & N. 168.

[5] 7 Exch. 300, 21 L. J. Exch. N. S. 241, 16 Jur. 200.

[6] 1 Campb. 464.

[7] See Farnham, Waters, p. 2711.

[8] Chatfield v. Wilson, 28 Vt. 49; Edwards v. Haeger, 180 Ill. 99, 54 N. E. 176.

[9] Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 18 Atl. 724, 5 L.R.A. 731.

[10] Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62.

cisions have indicted a tendency on the part of the court to regard percolating water, so far as it can be shown to be contained in a water-bearing stratum of earth, or in a basin extending underneath the property of several owners, as a great underground lake, which is the common property of the surface owners, and the water from which each has a right to use to satisfy his own needs for any reasonable purpose, but that he cannot make use of it in an unreasonable manner, or so as to destroy the rights of those having an equal right in it. The difficulties in the application of this doctrine are not so great as would at first appear, because the water throughout the saturated stratum is so much part of a common body that any excessive drawing of it at one place has an immediate effect in lowering the level throughout the basin, so that there is little difficulty in demonstrating the fact that the one making the excessive use is interfering with the common rights. It has been said that there are no correlative rights existing between proprietors of adjoining lands in reference to the use of water in the earth or percolating under the surface. And many cases have been decided upon this principle. But the attempt to act upon that doctrine very soon forces the conclusion that percolating water is not an exception to the general rule that rights in organized society are not absolute, but correlative, and that one man cannot be permitted to exercise any right if the direct effect of his act will be an injury to his neighbor.[11]

That the courts were unwilling to allow landowners to make whatever use of percolating waters their fancies dictated, irrespective of the injuries suffered by other landowners, is shown by those cases involving useless waste of, or malicious interference with, such waters, and also the decisions having to do with pollution, for it was held not only that one might be held liable if he, by acting through malice, or by wasting water, deprived another landowner of his supply from underground sources,[12] but also that a landowner could not be permitted to collect upon his premises injurious or offensive material in a place where it would be likely to find its way by the action of percolating water into his neighbor's well,[13] and that this applied to refuse from gas works,[14] cesspools, and privy vaults,[15] and manure heaps.[16] Apart from considerations of malice and pollution, many of the early American cases adhered, or at least indicated an inclination to adhere, to the rule of absolute rights.[17] On the other hand, it was suggested by the New Hampshire court

[11] Farnham, Waters, pp. 2711, 2712.

[12] Chelsey v. King, 74 Me. 164, 43 Am. Rep. 569; Springfield Waterworks Co. v. Jenkins, 62 Mo. App. 74; Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511, 5 Mor. Min. Rep. 108; Wyandot Club v. Sells, 6 Ohio N. P. 64, 9 Ohio S. & C. P. Dec. 106; Burke v. Smith, 69 Mich. 380, 8 L.R.A. 184, 37 N. W. 838 (*arguendo*); Stillwater Water Co. v. Farmer, 89 Minn. 58, 60 L.R.A. 875, 99 Am. St. Rep. 541, 93 N. W. 907; Barclay v. Abraham, 121 Iowa, 619, 64 L.R.A. 255, 100 Am. St. Rep. 365, 96 N. W. 1080; Gagnon v. French Lick Springs Hotel Co. 163 Ind. 687, 68 L.R.A. 175, 72 N. E. 849. But it is to be noted that, on the other hand, it has been held that the motive with which the act is done is immaterial. Chatfield v. Wilson, 28 Vt. 49; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 62 L.R.A. 589.

[13] Beatrice Gas Co. v. Thomas, 41 Neb. 662, 43 Am. St. Rep. 711, 59 N. W. 925; Brown & Bros. v. Illius, 27 Conn. 84, 71 Am. Dec. 49, 25 Conn. 593; Mears v. Dole, 135 Mass. 508; Whitney v. Batholomew, 21 Conn. 213; Kinnaird v. Standard Oil Co. 89 Ky. 468, 25 Am. St. Rep. 545, 12 S. W. 937, 7 L.R.A. 451. But note that it was held in Dillon v. Acme Oil Co. 49 Hun, 565, 2 N. Y. Supp. 289, that no action would lie for the contamination of wells or springs by polluting the underground sources by which the water reached them, by refuse from an oil refinery constructed and operated as well as it could be.

[14] Ottawa Gaslight & Coke Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263; Shuter v. Philadelphia, 3 Phila. 228; Pottstown Gas Co. v. Murphy, 39 Pa. 257; Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. 593; Ballard v. Tomlinson, L. R. 29 Ch. Div. 115, 54 L. J. Ch. N. S. 454, 52 L. T. N. S. 942, 33 Week. Rep. 533, 49 J. P. 692.

[15] Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Haugh's Appeal, 102 Pa. 42, 48 Am. Rep. 193; Wormsley v. Church, 17 L. T. N. S. 190; Anheuser-Busch Brewing Asso. v. Peterson, 41 Neb. 897, 60 N. W. 373.

[16] Livezey v. Schmidt, 96 Ky. 441, 29 S. W. 25; Woodward v. Aborn, 35 Me. 271, 58 Am. Dec. 699.

[17] Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Southern P. R. Co. v. Dufour, 95 Cal. 615, 19 L.R.A. 92, 30 Pac. 783; Roath v.

at a comparatively early date, that a man's right to appropriate percolating water in his own land was limited by the corresponding right of his neighbor, and extended only to a reasonable exercise of that right.[18] And in 1902, the California supreme court justified a limitation of the rule of absolute rights, and held in the leading case of Katz v. Walkinshaw,[19] that the owner of land had the right to the reasonable use of subterranean percolating waters, having reference both to his own and adjoining lands, and to land sensibly affected by his use; but that he had no right to divert such water to the detriment of adjoining landowners by means of artesian wells, and sell it to others, to be used by them for the irrigation of lands in some distance. In reaching its conclusion, the court stated that the fundamental principles of right and justice on which the common law is founded, and which its administration is intended to promote, require that a different rule should be adopted whenever it is found that, owing to the physical features and character of a state, and the peculiarities of its climate, soil, and products, the appplication of a given common-law rule tends constantly to cause injustice and wrong, rather than the administration of justice and right. Applying the doctrine of this case, the California court has reiterated the rule that the owner of land has a right to make only a reasonable use of water percolating therein for the benefit and enjoyment of his land, and that he cannot make an excavation in his land so as to divert the flow of water from other land, where the diversion is not for the benefit of his own property,[20] unless the same can be done without injury to other landowners.[21]

Few of the decisions have involved solely the question of natural uses. Most of the recent cases discuss the rights as between persons using water for natural and artificial purposes respectively. It is held that a use for natural purposes takes precedence over artificial uses;[22] but as between artificial uses, neither landowner has a right to precedence, the right of each being limited to use the water for the benefit of his own property; and in case he attempts to remove the water from the land for sale, he cannot complain if the supply is diminished by others who make a like use of it.[23] But it is held that the fact that one has marketed water naturally flowing from springs on his land does not deprive him of the right to equitable relief against the forcible pumping of the water from the common reservoir and letting it go to waste for the purpose of extracting gas therefrom and selling it.[24] The taking of water for a municipal water supply at a distance may, in a sense, be regarded as an artificial use, and probably would have been so denominated at an earlier date, although such a use of water taken from an artesian basin underlying a city has lately been held not to be an artificial

Driscoll, 20 Conn. 533, 52 Am. Dec. 354; Greenleaf v. Francis, 18 Pick. 117; Clarke County v. Mississippi Lumber Co. 80 Miss. 535, 31 So. 905; Mosier v. Caldwell, 7 Nev. 363; Ocean Grove Camp Meeting Asso. v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168; Delhi v. Youmans, 50 Barb. 316, affirmed in 45 N. Y. 362, 6 Am. Rep. 100; Goodale v. Tuttle, 29 N. Y. 466; Bloodgood v. Ayers, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; Frazier v. Brown, 12 Ohio St. 294; Chatfield v. Wilson, 28 Vt. 49.

[18] Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 Am. Dec. 179. This *dictum* was approved in Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276, but in neither of the cases was the question before the court for decision.

[19] 141 Cal. 116, 99 Am. St. Rep. 35, 74 Pac. 766, 70 Pac. 663, 64 L.R.A. 236.

[20] Newport v. Temescal Water Co. 149 Cal. 531, 87 Pac. 372, 6 L.R.A.(N.S.) 1098; Cohen v. La Canada Land & Water Co. 151 Cal. 680, 91 Pac. 584, 11 L.R.A.(N.S.) 752, former appeal, 142 Cal. 437, 76 Pac. 47; Burr v. Maclay Rancho Water Co. 154 Cal. 428, 98 Pac. 260, subsequent appeal, 160 Cal. 268, 116 Pac. 715; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Miller v. Bay Cities Water Co. 157 Cal. 256, 107 Pac. 115, 27 L.R.A.(N.S.) 772.

[21] Cohen v. La Canada Land & Water Co. and Burr v. Maclay Rancho Water Co. supra.

[22] Willis v. Perry, 92 Iowa, 297, 60 N. W. 727, 26 L.R.A. 124.

[23] Merrick Water Co. v. Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10.

[24] Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 128 Am. St. Rep. 555, 87 N. E. 504, 16 Ann. Cas. 989, 23 L.R.A.(N.S.) 436.

taking.[25] But the latter view does not exclude the doctrine of correlative rights, for there is still room for the case to turn upon the matter of reasonable use measured by the respective requirements of well owners and the inhabitants of a populous city. Indeed the case which denied that such a taking was artificial went no further than to hold that if, in order to furnish the inhabitants with an ample supply of pure water, it was reasonably necessary so to lower the level of the water in the artesian basin as to subject a well owner to the burden of pumping the water from his well by a power pump, he should submit to that burden.[26] Doubtless, if such pumping had had the effect entirely to dry up such well, the owner would have been entitled to some equitable or legal relief, upon the theory that no taking of water which works an entire deprivation as to another can be deemed reasonable.

The rights of all must be considered; and if it is necessary, in order that all may have a measure of enjoyment, that each must be subjected to some burden or deprivation, the latter must submit thereto. But, as suggested above, a different situation is presented where there is a total exhaustion of the water so far as a particular landowner is concerned; and in such case, he should be entitled to recover for the damage thereby caused. Such is the doctrine of a number of New York cases holding that the draining of land of a private owner by a city pumping works, which exhausts from all ground thereabout the natural supply of underground or subterranean water, and thus prevents the raising of crops to which the land is and will be particularly adapted, or destroys crops after they are grown or partly grown, renders the city liable to the landowner for the damage he sustains, and entitles him to an injunction against the continuance of the wrong.[27] In other jurisdictions, a like position has been taken. Thus, it is held in Iowa that a city is liable for diminishing the supply of water in a private well so as to leave an insufficient quantity for domestic purposes, by sinking wells and pumping therefrom a municipal water supply;[28] and a West Virginia case holds that the owner of land who explores for and produces subterranean percolating water within the boundary of his land is limited to a reasonable and beneficial use of such water, when to use it otherwise would decrease the water supply of a valuable natural spring of another on adjoining land.[29] New Jersey has recently come to the same way of thinking; for in the case of Meeker v. East Orange,[30] it is held that the withdrawal by means of artesian wells of percolating underground water by a municipality, for the purpose of supplying its inhabitants at a distance with water, which, but for its interception, would have reached and benefited the lands of another, to such an extent as to damage such land for agricultural and

[25] Thus, it is held in Erickson v. Crookston, Waterworks, Power & Light Co. 105 Minn. 182, 117 N. W. 435, 17 L.R.A.(N.S.) 650, that the fact that water is pumped by a corporation from an artesian basin for the purpose of supplying the inhabitants of a city with water for domestic purposes does not constitute an artificial taking as distinguished from the right enjoyed by private well owners, but that both stand upon the same basis, subject to the rule of correlative rights.

[26] Ibid.

[27] Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L.R.A. 695; Westphal v. New York, 34 Misc. 684, 70 N. Y. Supp. 1021, affirmed in 75 App. Div. 252, 78 N. Y. Supp. 56, which is affirmed in 177 N. Y. 140, 69 N. E. 369; Reisert v. New York, 35 Misc. 413, 71 N. Y. Supp. 965 (affirmed in 69 App. Div. 302, 74 N. Y. Supp. 673, and reversed in 174 N. Y. 196, 66 N. E. 731, and after a subsequent trial, 42 Misc. 275, 86 N. Y. Supp. 576, reversed in 101 App. Div. 93, 91 N. Y. Supp. 780); Jager v. New York, 35 Misc. 622, 72 N. Y. Supp. 131, affirmed in 75 App. Div. 258, 78 N. Y. Supp. 49; Dinger v. New York, 42 Misc. 319, 86 N. Y. Supp. 577, affirmed in 101 App. Div. 202, 92 N. Y. Supp. 1120.

[28] Willis v. Perry, 92 Iowa, 297, 60 N. W. 727, 26 L.R.A. 124.

[29] Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L.R.A.(N.S.) 266.

[30] 77 N. J. L. 623, 134 Am. St. Rep. 798, 25 L.R.A.(N.S.) 465, 74 Atl. 379, reversing 76 N. J. L. 435, 70 Atl. 360, and nullifying any inference arising in McCarter v. Hudson County Water Co. 70 N. J. Eq. 695, 118 Am. St. Rep. 754, 65 Atl. 489, 10 Ann. Cas. 116, 14 L.R.A.(N.S.) 197, from the court's statement that it would concede for the then present purposes that subterranean water such as might be reached only by driving wells, when thus acquired, became absolutely the property of the owner of the soil, and might be dealt with by him as merchandise.

other legitimate uses to which it has been put, renders the city liable for the damages so sustained, since such waters cannot be withdrawn for uses not connected with any beneficial enjoyment of the land whence they are taken, to the injury of the rights of adjoining landowners to a reasonable user thereof. And the Indiana supreme court has indicated indirectly that it favors the rule of correlative rights by a case already referred to.[31]

On the other hand, in addition to the Georgia,[32] Illinois,[33] Minnesota,[34] Mississippi,[35] Pennsylvania,[36] Vermont,[37] and Wisconsin[38] cases already referred to, there are cases in a few other jurisdictions which adhere to the doctrine of absolute right, or at least incline in that direction. This is true of the District of Columbia,[39] Massachusetts,[40] and Texas.[41] Nevertheless it is not too much to expect that the courts in most, if not all, of these jurisdictions will in time do as did the New Jersey court; that is,—forsake the idea that one may do as he wishes with percolating waters, irrespective of how others may be affected, and turn to that wholesome rule which renders him answerable for all unreasonable acts with respect thereto, which result in damage to another.

[31] Gagnon v. French Lick Springs Hotel Co. 163 Ind. 687, 72 N. E. 849, 68 L.R.A. 175.

[32] Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62.

[33] Edwards v. Haeger, 180 Ill. 99, 54 N. E. 176.

[34] Stillwater Water Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. W. 907, 60 L.R.A. 875.

[35] Clarke County v. Mississippi Lumber Co. 80 Miss. 535, 31 So. 905.

[36] Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 18 Atl. 724, 5 L.R.A. 731.

[37] Chatfield v. Wilson, 28 Vt. 49.

[38] Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 62 L.R.A. 589.

[39] The doctrine of absolute right is invoked in New York Continental Jewel Filtration Co. v. Jones, 37 App. D. C. 511, 37 L.R.A.(N.S.) 193, holding that no action lies for withdrawing percolating water from under the surface of a parcel of real estate, in the construction of a tunnel of a railroad under an adjoining street the fee of which is in the public, although the result is a consolidation of earth which causes a settlement and cracking of the walls of buildings thereon.

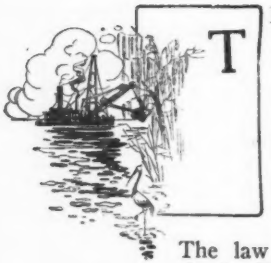
[40] There is a *dictum* in Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352, to the effect that one landowner may draw from his property water to supply a large community, although he thereby takes water which would naturally come to the property of his neighbor to its benefit.

[41] In Houston & T. C. R. Co. v. East, 98 Tex. 146, 107 Am. St. Rep. 620, 81 S. W. 279, 4 Ann. Cas. 827, 66 L.R.A. 738, it was held that a railroad company which sunk a large and deep well on its own property to secure water for the use of shops and engines was not liable for injury thereby caused to the owners of neighboring land, although it pumped therefrom such large quantities that the subterranean water was drawn from the surrounding land and the wells thereon were deprived of a water supply. This reverses the court of civil appeals, the opinion of which is reported in 77 S. W. 646, and the contention of which was that the railroad company should be limited to a reasonable use.

The Law of Irrigation in the Far West

BY HON. JOHN B. CLAYBERG

Of the San Francisco Bar



THE term "irrigation" means, briefly, the application of water to land by artificial means, for the purposes of producing crops and products of the soil.

The law of irrigation in the far West is *sui generis,* and differs materially from the common law of waters.

Irrigation has always been considered a necessity in that part of the far West where the rainfall is very restricted, in order that crops may grow and mature.

Generally speaking, irrigation is a very ancient art, and, while the law of irrigation which we shall discuss arose after the discovery of gold in California, yet history speaks of irrigation as being in use many centuries before the time of Moses. It has been applied to a greater or less extent in Egypt, Assyria, Persia, China, India, Algeria, Italy, France, Spanish South America, Mexico, and by the aborigines in the United States.

Its history in Egypt has been more accurately traced further back than elsewhere, and therefore Egypt has been designated as "the birthplace of irrigation." The systems in use there were so colossal that the great systems of the present day seem puerile beside them. The modern mind can scarcely grasp, much less fully comprehend, the feats of ancient engineers in that regard. For instance, it is now generally believed that the six cataracts of the Nile between Assouan and Khartoum are the remains of colossal irrigation systems. Herodotus speaks of irrigation canals in Assyria, reaching from the Euphrates to the Tigris.

The law of irrigation in the far West is based upon the old principle of equity jurisprudence, "first in time, first in right," which was the foundation and principle around which it grew and developed.

Generally, we have followed the plan of the Egyptians in the form of the system now in use; namely, to impound a stream and use its waters in flooding the land.

Appropriation.

The right depending upon the use of waters upon the land before it can become beneficial, anyone desiring to use the waters should be compelled to acquire the right to such use. This right is initiated and acquired by what is termed "appropriation." This has been defined to be "the intent to take, accompanied by some open, physical demonstration of such intent, and for some beneficial use.

Judge Pomeroy says: "The appropriation must be made with a bona fide present design or intention of applying the water to some immediate useful or beneficial purpose, or in the present bona fide contemplation of a future application for such purpose, by the parties thus appropriating or claiming. There must be some actual, positive, beneficial purpose existing at the time, or in contemplation in the future, as the object for which the water is to be utilized."

It may be appropriated for any beneficial use, but before the appropriation is complete, two actual physical acts must exist; namely; (1) Diversion; (2) Actual or intended use.

Diversion.

Appropriations as a rule are made of only portions of the waters of the stream or lake, the amount being limited by the

necessities of the intended use, therefore the necessity of segregating the amount of water desired to be appropriated from the remainder of the water in the stream or lake becomes apparent. Again, by appropriation the claimant desires to initiate an exclusive right or property to the use of the water which he seeks to appropriate. Such right cannot be acquired, separate from the properties in the land over which it flows or stands, while the waters remain or are flowing in their natural condition; therefore, for the purpose of identifying the amount claimed, and for the purpose of initiating a right of property to the use thereof, the claimant is required to actually divert the waters claimed from the natural bed of the stream or lake, by means of a ditch, flume, canal, or other structure. The structure or method used in the diversion is immaterial, so long as the amount of water claimed is actually taken out of the stream or body of water. He may use a dry ravine, water course, or gulch to the same effect as though the structure were wholly artificial. He may use a flume, instead of a ditch or canal. He may make his diversion by pumping. After a diversion is complete, he may return the water diverted back into the natural channel of the stream and afterward "recapture" the same lower down, thus using the natural channel of the stream as a part of his ditch. If he diverts the water to a dry ravine, gulch, canyon, or water course, and it then sinks, he may recapture it when it arises.

Beneficial Use.

The next element to a complete appropriation is the use of the water for some beneficial purpose. This must follow the actual diversion within a reasonable time.

It is therefore apparent that, in order to make a valid appropriation of water, the concurrence of two distinct elements are necessary; namely, (1) Intent to appropriate the water for a beneficial purpose; (2) The existence of the physical acts by which such intent is made effective: either without the other is insufficient. We have seen that the necessary physical acts are diversion, and use for some beneficial purpose. Appropriation is, therefore, not complete until the ditch or other conveyance for the water has been completed, and the actual use of the water for the purpose intended has begun, or at least so that its use can be commenced. Until that time the appropriator has no vested right in the use of the water diverted for the purpose for which he sought to appropriate.

When Right Attaches.

Whenever, however, the ditch or conveyance by which the water is diverted and conveyed is complete, so that the water diverted and sought to be appropriated can be used for the purposes intended, the appropriator's vested right attaches and relates back to the time he commenced work, if he has used due diligence in its completion. If, however, he has been negligent and inexcusably dilatory in completing the work, his exclusive right as against subsequent appropriators will only date from its completion.

Usually statutes of the respective states make provision for the time allowed for the completion of the necessary work and regarding his notice of appropriation.

Rights of Appropriator.

No absolute right or title to the corpus of the water appropriated is acquired, but simply the absolute and exclusive right to the use thereof.

The right of an appropriator is limited to the quantity of water necessary for the proper irrigation of his land, when diverted and conveyed to the place of use by a reasonably economical means properly constructed and kept in repair. His rights are measured by the necessities of his use, and not by the capacity of his ditch or other conveyance, when the same carries more water than his needs require. He is limited in the amount to that which his ditch or conveyance will carry, even though it does not carry sufficient to satisfy his needs, because he can only use for beneficial purposes the amount of water which his ditch will carry from the point of diversion to the place of use; therefore, the capacity of the ditch or conveyance is always measured at its smallest point. He has no right to use the water waste-

fully and in disregard of the rights of other appropriators. It is his duty when the water is scarce to economically convey it to the point of use, and to use it only at such times and in such quantities as are reasonable. And he should shut off the flow of his ditch or conveyance when the water is not needed by him.

The amount of water intended to be used being fixed by the appropriation, water not within prior appropriation is always subject to another appropriation. It therefore follows that one appropriator cannot, as against subsequent appropriators, enlarge or extend his use so as to acquire more water than he first appropriated, without making a new appropriation for such excess. Such new appropriation would be entirely independent of the original one, and would only have priority from the date of actual use.

One may change his point or means of diversion at his pleasure, without losing his right of priority, if such change does not injuriously affect others. He may also change the place of use of the water diverted and appropriated at any time, provided such change does not interfere with the rights of others, and he may change the purpose of use at any time under the same limitation.

The doctrine of "first in time, first in right," has been continuously recognized and applied, and has been and still is the fundamental principle of appropriation; therefore each appropriator's right is prior to all appropriations made subsequently, and this right of priority is as much property as the right to use the water, and cannot be interfered with or encroached upon.

James B. Clayberg

The Lawyer Poet

Tell a lawyer he's a poet in his heart;
He will say he is no framer
Of a rhyme, and a disclaimer
He will utter with an honest pleader's art.

If you watch him when he isn't on his guard,
You will note the pleasant truth is,
Though his protest most uncouth is,
He's a soul as full of fancy as a bard.

All the world to him a garden long has been;
And he sees its many beauties
Doing well his varied duties,
Mid the merry joyous loving hearts of men.

He will bring to you the sunshine with a smile;
Though he may not write in meter
The effect is dearer, sweeter,
For he lives a splendid poem all the while.

Wm. D. Fletcher

Early History of the Doctrine of Appropriation

BY JOSEPH R. LONG

Bradford Professor of Law, Washington and Lee University; Author of "Law of Irrigation," "Law of Domestic Relations," "Jurisdiction and Procedure of Federal Courts."

THE doctrine of the acquisition of water rights by prior appropriation affords, perhaps, the best example of the development of an industrial custom into a doctrine of law within the lifetime of a single generation to be found in the history of American jurisprudence. According to this doctrine, the right to the use of water is in no way dependent upon the ownership of the banks of the stream or watercourse from which the water is taken; he who first diverts the water and applies it to beneficial use has a right thereto as against all subsequent appropriators, even as against the riparian owner himself, where the first appropriator is not himself the riparian proprietor. This doctrine is, of course, in plain derogation of the common-law doctrine of riparian rights as now established in England and most of the United States, and yet it is the common law of several of the western states, and constitutes probably the most striking original contribution of the American courts to the science of jurisprudence. It is now well settled that this doctrine is not a doctrine of the English common law. As declared by Judge McKinstry in the famous case of Lux v. Haggin, 69 Cal. 255, 10 Pac. 674: "In examining the numerous cases which establish that the doctrine of 'appropriation' is not the doctrine of the common law, we meet an embarrassment of abundance." At the same time, it may be interesting to note that the common law was not always so well settled in favor of the doctrine of riparian rights. There are several early English cases which afford considerable support to the doctrine of appropriation. Thus in 1824 in the case of Williams v. Morland, 2 Barn. & C. 910, Bayley, J., said: "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*." So also, in 1831, in the case of Liggins v. Inge, 7 Bing. 682, Chief Justice Tindal said: "Water flowing in a stream, it is well settled, by the law of England, is *publici juris*. By the Roman law, running water, light, and air were considered as some of those things which had the name of *res communes*, and which were defined 'things the property of which belongs to no person, but the use to all.' And, by the law of England, the person who first appropriates any part of the water flowing through his land to his own use has the right to the use of so much as he thus appropriates, against any other." This theory of title by appropriation was much modified by subsequent decisions, and the doctrine of riparian rights finally developed. According to this doctrine, water rights are not acquired by or dependent upon appropriation or use, but each riparian owner has the right to the use and uninterrupted flow of the stream by virtue merely of his riparian ownership. This doctrine, however, was not finally established until 1833, in the case of Mason v. Hill, 5 Barn. & Ad. 1. In this case Lord Denman re-examined the

earlier English cases, as well as certain passages in Blackstone and of the Roman law which were supposed to sustain the doctrine of appropriation, and held that these authorities, when properly understood, do not sustain the doctrine. It is thus settled that the doctrine of appropriation is not a doctrine of the English common law, nor of the common law of most of the states of the Union.

The doctrine of appropriation, as is well known, originated in California soon after the first settlement of that state, upon the discovery of gold in 1848. Its first application was in connection with mining operations, which involved a use of water inconsistent with the common-law doctrine of riparian rights. It is sometimes supposed that the doctrine of appropriation was obtained by the California miners from existing systems of law, such as the Roman law, or, more directly, the Spanish-American law in force in Mexico. As stated above, the doctrine, at least in favor of riparian proprietors, obtained for a time some foothold in English law. And a form of the doctrine was also recognized by the Mexican law. It is not probable, however, that the miners flocking to California from all parts of the world in search of gold were familiar with these principles of ancient or foreign law. In particular, as to the Mexican law, the country to which the settlers came was practically uninhabited, and very little Mexican or any other law was in force. The land was not reduced to private ownership, but was a vast uninhabited tract belonging to the public domain. It is most likely that the pioneers acted according to the suggestions of plain common sense, and applied the universal principle that where the gifts of nature lie unclaimed by anyone, he has the best right who first appropriates them to his own use. On this principle—the principle of "first come, first served"—they acquired and held their mining claims, and they naturally extended its application to the water they needed to work their claims. In this sense, as an application of the principle of title by occupancy, it may be said that appropriation is a doctrine of the common law. The principle thus probably adopted from necessity was soon embodied in the regulations of the mining districts by which the business of mining was largely governed, and in time was recognized by the courts, and, later still, by the legislature, and thus finally became a settled principle of law.

The first case in which the doctrine of appropriation was urged upon the supreme court of California seems to have been the case of Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Mor. Min. Rep. 175, decided in 1853. In this case the court refused to accept the doctrine as law. The question next arose in the case of Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Mor. Min. Rep. 178, decided in 1855, a case involving conflicting claims to the waters of a stream on the public domain. In an instructive opinion the court held that the common-law doctrine was not applicable upon the public lands, and recognized and adopted the customary doctrine of appropriation as governing the case.

This appears to be the first judicial adoption of the doctrine of appropriation in this country. In writing of this decision, an early California author says: "The broad principle was then announced for the first time in any system of jurisprudence, that the right to the unlimited use of water in a running stream vested in the first appropriator, whether a riparian owner or not, with the correlative right to divert it to any extent, for sale or other use; and that subsequent locators, even for mining purposes, upon the banks of the same stream, as riparian owners, could only acquire an interest in the water for any purpose subordinate to the right of the first appropriator, provided any water was left." (Yale, Mining Claims & Water Rights [1867], p. 137.) The same writer adds that the struggle between the common-law doctrine and the doctrine of appropriation continued from the case of Eddy v. Simpson, through Irwin v. Phillips, until the case of Crandall v. Woods (1857) 8 Cal. 136, 1 Mor. Min. Rep. 604, "when Chief Justice Murray yielded to the weight of the authority of decided cases and gave up the struggle."

The decision in Irwin v. Phillips was thus followed in later cases, and soon became the settled law of the state, though,

as indicated, not without some judicial opposition.

The doctrine of appropriation originated, as we have stated, in connection with the use of water for mining purposes; and as mining was the chief, and for a time almost the only important, industry of the country, it was not unnatural that the rights of miners should at first have been regarded, by the miners at least, as paramount to the rights of those engaged in other pursuits. For a time, indeed, the legislation of California favored the miner as against the settler, but the courts were always disposed to treat all occupations alike. As early as 1855, in the case of Tartar v. Spring Creek Water & Min. Co. 5 Cal. 395, 14 Mor. Min. Rep. 371, it was held that an appropriation of water on the public domain to run a sawmill was superior to a later appropriation for mining purposes.

The first case involving the right of an appropriator for irrigation purposes seems to be the case of Rupley v. Welch, 23 Cal. 453, 4 Mor. Min. Rep. 243, decided in 1863, though the case of Crandall v. Woods (1857) 8 Cal. 136, 1 Mor. Min. Rep. 604, related to the right of a riparian owner to use water for irrigation. In Rupley v. Welch it was held that an appropraition of water for irrigation was good as against a subsequent appropriation for mining. The doctrine first clearly established in this case, that the superiority of right to the use of water for industrial purposes depends solely upon priority of appropriation, and not at all upon the particular use intended, is now elementary law, and is supported by a great number of cases decided throughout the West.

Although the doctrine of appropriation originated in California, its application has been limited in that state to appropriations of water on the public lands; the common-law doctrine of riparian rights applies wherever the land has been reduced to private ownership. The same doctrine is also in force in several other states. But in Colorado, Arizona, Idaho, Nevada, New Mexico, Utah, and Wyoming the doctrine of riparian rights is not recognized, and the doctrine of appropriation applies to all waters, whether on the public lands or not. The first case in which this extreme form of the doctrine was laid down seems to have been Coffin v. Left Hand Ditch Co. 6 Colo. 443, decided in 1882, though in that case it was perhaps not actually necessary to decide that the doctrine applied to private lands. The doctrine of riparian rights was declared to be inapplicable to natural conditions in the state, while the doctrine of appropriation was evoked "by the imperative necessity for artificial irrigation of the soil."

The earliest legislation on the subject of the appropriation of water seems to have been that embodied in the Howell Code of Arizona, adopted by the first territorial legislature in 1864. The first Federal act on the subject was a section of the act of July 26, 1866, which is still in force as § 2339 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1437). This section simply confirmed and recognized the customary doctrine of appropriation as applied to the public lands. The first comprehensive state legislation was the brief Code of thirteen sections adopted by California in 1872, which is still in force, and which has served as a model for much of the subsequent legislation. The statute, however, was mainly declaratory of the existing law and applied only to the public lands. The subject of appropriation is now largely regulated by statute in all the Western states, and appropriation is the underlying principle of the Irrigation Codes recently adopted in several of these states.

Jos. R. Long

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The Judge Versus the Law

BY HON. A. G. ZIMMERMAN

County Judge of Dane County, Wis.

THE old husbandman was near ninety when he died. He had lived a frugal, careful life, and was in fair condition to look after himself and his property until the end. Ten years before, having been left a widower, he rented his farm on shares, to his youngest child, Peter, an only son then about thirty. The contract was carefully drawn in all its details. It reserved a couple of furnished rooms in the old homestead for the owner. The ordinary incidentals as to fuel, care, a personal conveyance, etc., were duly provided for.

The old man being vigorous, and having nothing else to do, intended to batch it, as, he said, *i. e.*, get his own meals. This he probably did for the first five years, except when one of his four married daughters, who lived within a dozen or so miles of the place, staid with him,—which they did from time to time,—or when he, sometimes for months at a time, lived with one of them. However, the evidence was conflicting as to whether or not the son provided board for most of this time.

It was undisputed that Peter and his wife furnished the meals during the last five and a quarter years. It was also conceded that Peter received payment from the father, monthly, at the rate of a dollar and a half a week. It was very clear that the old man understood this to be payment in full. As a matter of fact the service was worth at least twice that amount, and Peter afterward made a claim for three times that sum.

While the old farmer lived, Peter never complained, nor made any further demand, nor kept any account, but allowed the father to rest content that he fully paid for his board.

The father loaned the son various sums from time to time, and held as evidence thereof, a dozen or so notes. He also saw that Peter paid the interest in cash on these notes, annually. There was no dispute about this. Nor was there any dispute about the fact that the old man always paid his obligations promptly, and that he left no debts whatever,—except as to the alleged indebtedness for board.

Peter claimed a contractual relation,—that he was to be paid for the board, but that no amount was mentioned and that he was entitled to be paid *quantum meruit*. The contract was conceded, though the evidence seemed to make it clear that the agreed rate was the amount actually paid. Of course Peter could not be allowed to testify directly as to the agreement. But there could be no doubt as to the fact.

After the estate was brought into court, Peter filed a claim for some $1,500, in addition to what he had received, for board and care. Had he been more modest, the matter might have been adjusted. But the feeling became bitter. It was to be a fight to the finish,—the four sisters and their husbands, against Peter.

There was a goodly estate—some $40,000 in value. All shared practically the same under the will,—various notes outstanding against the children to be reckoned as advancements. Two of the sisters were named as executrixes. This in itself seemed to imply some doubt in the old man's mind about Peter.

The day of the trial arrived, and the entire family was present in court. So were numerous neighbors who had been drawn into the scrimmage. Peter was represented by an able attorney, as were also the sisters. And there was still an-

other lawyer, acting as guardian *ad litem* for minors, who took sides with the sisters.

More or less bitterness was developed during the trial, and it did not appear that the family could ever again be reconciled, or friendly. The matter was thoroughly threshed out, and no quarter was asked or given. A day was occupied in taking the testimony, and the argument of counsel occupied half of another day.

But during the argument of the attorneys, the judge had been observing some things that did not appear in the record. He had also been thinking some things not laid down in the books.

As the controversy was nearing a conclusion, the judge noticed the tense and drawn faces of Peter and some of the sisters; and the troubled, honest faces of the farmer husbands.

As the trained lawyers summed up and rounded out the various features of the case, the seriousness of a real fighting lawsuit between the members of a family seemed to dawn upon them. Probably none of the interested parties had ever actively been in court before. And there never had been any serious trouble in the family prior to this.

As the family closet was being aired by the counsel, and the deceased father's name was being bandied about, Peter's troubled eyes watered slightly in spite of himself. There had been no complaint but that his care and treatment of his parent had been commendable.

In an opposite corner of the court room, the eldest sister, who took little active part in the proceedings, and who no doubt had often fondled Peter in his infancy, probably was letting her mind wander over the past, when they were a happy and united family at the old homestead. And as the history of the case was being recited, her handkerchief frequently found its way to her sad eyes.

And then the judge, from time to time, would spear into the closing argument of Peter's counsel with the purpose of having a weak point elucidated if possible.

As the arguments came to a close at noon, and the last word had been said, all eyes,—of counsel, parties, and neighbors—were glued upon the judge. It was all up to him now, and he had heretofore indicated that he would not take the case under advisement, but was ready to decide at once. There was no doubt whatever, with him, as to how he must decide under the law applicable to facts in the case.

He knew also that no matter which way he decided (though he felt he had no choice), the case no doubt would be appealed to a higher court, and further strife and bitterness in this family engendered and prolonged.

And the judge, having observed some things, and having thought other things, silently gazed into the faces of his auditors for a minute, and then surprised them by saying:

"I am not going to decide this case until after an intermission of a few minutes. However I may decide it, the result will not help matters much. The parties will likely continue this strife in a higher court on appeal, and there will be more bitterness, more misunderstandings, and more trouble and expense for you all.

"This is the kind of a case that ought never to have been brought into court. The parties should have gotten together and settled it among themselves. Then they could have continued to live together in peace and harmony.

"Without indicating how I shall be obliged to decide this case, I will suggest that if you had selected me simply as an arbitrator, outside of court, to advise you how to settle it, to be fair and just among yourselves, without regard to the law as applicable to the facts, I should have said that you sisters should pay Peter a dollar and a half a week, in addition to what he has already received, for boarding and taking care of your father, during the five and a quarter years about which there is no dispute, making $409.50 in all.

"However, bear in mind that I am not now suggesting how I shall have to decide under the law. We will now take a recess of ten minutes, before I announce my decision."

Thereupon the judge abruptly left the bench and the court room, and entered his private office, shutting the door behind him.

The parties and their lawyers were left

together in the court room,—with the undecided controversy still on their hands.

The judge, in his privacy, proceeded to have a smoke, and to ponder on what he was going to say to square himself with the parties for deciding against Peter under the law (in case he announced a decision) and at the same time inferentially suggesting that to do justice it ought to be fixed up the other way.

Naturally, the question would arise as to whether the law and justice in this case did not harmonize and point the same way; and, if not, why not?

As a matter of fact, the thing was perfectly clear to the judge himself, and he was not criticizing or finding fault with the law, either.

The apparent inconsistency arose from the fact that there were different elements to consider in the two propositions. The point in the whole matter may be briefly stated, in this way:

Under the law and the facts, as applicable to the dealings between Peter and his father, Peter was legally entitled to nothing more. But as between the sisters and Peter, ethically, the former should acquiesce in the latter being fairly and individually compensated for performing well and faithfully a duty which was the common duty of all, and for which they were all equally compensated with the common property. The fact that the father drove a sharp, advantageous, legal bargain with the son did not now excuse the sisters, ethically, or justify them in prolonging family strife.

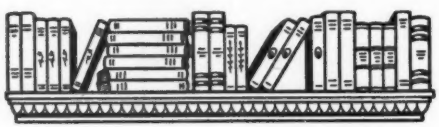
When the judge re-entered the court room, the attorneys requested a further adjournment until after dinner, which was readily granted.

As a result of this extraofficial proceeding, the parties finally got together, not only on this claim on the lines intimated, but included in their compromise various other matters of difference, including a dispute as to items of chattel property and as to the lease of the farm for the coming year.

A written stipulation was entered into in open court and approved by the judge. The parties were all smiling and happy and satisfied, and, strange to relate, so were the attorneys.

The judge was congratulated and thanked for his suggestions,—and he never decided the case. He indicated to the parties that they were all partly wrong and partly right,—depending upon the view point,—and told them not to thresh over the matter, but to forget that there ever had been any controversy; that life was too short, and home ties too precious, to justify the keeping up of family strife over a mere matter of a few dollars of no real importance to any of them.

But of course that was no proper way to try a lawsuit! Now, was it?



Passing of Air Ship over Property as Trespass

[ED. NOTE.—The following interesting opinion was delivered recently by the appellate division of the moot court at Rochester, New York. The acting judges were Messrs. William F. Strang, Paul Folger, and Homer E. A. Dick. Mr. Leo J. Rice appeared for the plaintiff-respondent and Mr. Alexander G. Davis for the defendant-appellant. The August, 1911, "Law of the Air" number of CASE AND COMMENT, and the cases referred to therein, were copiously cited on the argument].

THIS is an appeal by the defendant from a judgment of the supreme court, entered in Monroe county clerk's office on August 20, 1912, in favor of the plaintiff, entered upon a verdict directed by the court at a trial held on that day. The verdict directed was for nominal damages in favor of the plaintiff, and defendant excepted to this disposition of the case and asked to go to the jury upon the question of whether or not the defendant had committed a trespass.

It appeared undisputed at the trial that the defendant is the owner of a piece of property situate on Park avenue, in the city of Rochester, New York, having 50 feet frontage on Park avenue and extending back of the same width 100 feet. On the front part of this property is located a twenty-room house, and on the rear part of the lot is a garage. The defendant was the owner of an air ship or aeroplane, and at the time in question was engaged in carrying the mail from the city of Rochester, New York, to the village of Canandaigua, New York, and to traverse this distance in a direct line, it was necessary for the defendant to pass over the plaintiff's property, and he did so, the air ship being at the time at a height of 100 feet above the ground. The plaintiff claims that the defendant operated his air ship negligently, bringing it to a point within 100 feet of the ground, while defendant claims that his airship was driven to that level by currents of air. It is not claimed, however, that the horizontal position of the air ship was affected in any way by the air currents. On account of the manner in which this case was disposed of at the trial, the defendant is entitled to the benefit of all the facts introduced in his favor, and all the facts warranted by the evidence must be assumed as settled in his favor. Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40, 45 L.R.A. 547.

The air ship was not owned by the Federal government, nor under its control, so that we are not concerned with the question of the right of the Federal government to navigate the air over any portion of the territory within its domain. The fact that the defendant was engaged in carrying the mails has, in our opinion, no bearing upon the case; nor do we regard as important the fact, as claimed by the defendant, that the air ship was driven to its position 100 feet above the surface of plaintiff's land by the air currents. The proof is undisputed that the defendant intended to pass over the plaintiff's property, and if in doing so it was necessary for him to lower his ship to a point so near the surface, that fact does not excuse him, because he placed himself in a position where such a fact might be possible. There was some evidence introduced at the trial that the passing of the ship over the plaintiff's property caused actual damage to him, but this evidence was disputed by the defendant. As a verdict of nominal damages only was directed by the court, and as plaintiff is satisfied with that verdict and has not ap-

pealed from the judgment entered upon it, we will regard the proof as showing that the passing of the air ship did not cause any actual pecuniary loss to the plaintiff. The question is, therefore, whether the passing of an air ship over the plaintiff's property at a height of 100 feet above the surface is such an invasion of the plaintiff's right that he may maintain an action of trespass therefor.

It was an old maxim of the common law that he who owns the soil owns it to the sky and to the center of the earth. 8 Am. Eng. Enc. Law, 2d ed. 458.

As Blackstone expresses it: "The owner of real property owns downward to the center of the earth and upwards to infinity." We think that under the authorities, the passing of the defendant's air ship over the plaintiff's property at the height mentioned was a trespass upon the plaintiff's rights, irrespective of the question of actual damage. Our attention has not been called to any statute of New York state, or of the United States, permitting the navigation of the air over land held in private ownership, nor are we able to find any such statute. Therefore, the rule of the common law applies. If modern necessity requires that air ships should have the right to navigate the air, that is a matter of legislative enactment. We cannot make the law; we apply it as we find it. We do not mean to intimate that any statute purporting to relieve from liability the owner or operator of an air ship passing through the air or space over land held in private ownership, at a height of 100 feet above the surface, would be constitutional, but that question is not before us for decision.

On the oral argument counsel called our attention to a statute in France which, in effect, purports to license the navigator to sail through the air, and to relieve him from liability therefor, provided he causes no actual damage to the landowner over whose property he passes. While the common law was not part of the law of France, it appears that the legislative body of that country recognizes the necessity of the statute in order to relieve the navigator from trespass.

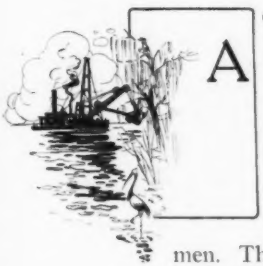
Our attention has been called to several cases where the facts were held not to constitute trespass. We have examined them with care and think that they are not applicable to the case before us. In Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623, it was held that where one places a steam boiler upon his premises and operates the same with care and skill, so that it is no nuisance, he is not liable for damages to his neighbor caused by the explosion of the boiler, in the absence of proof of fault or negligence on his part. In referring to this case, the Court of Appeals in Sullivan v. Dunham, 161 N. Y. 290, at 294, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L.R.A. 715, said: "That was not a case of intentional, but of accidental, explosion." Here the defendant voluntarily placed himself and his air ship in a position over the plaintiff's property, and if his air ship was driven to a lower level than he intended it to be, nevertheless he must take the consequences of his voluntary act. It follows that the judgment should be affirmed with costs.

All concur.

The Reclamation of the Arid West

BY HON. STANLEY E. BOWDLE

Of the Cincinnati Bar



A GREAT many people in these United States are becoming very conscious in these days of the fact that opportunities are closing up rather rapidly to young men. The days of bonanza business have passed. We are getting down rapidly to "brass tacks." One can hope for little more than a superintendency or clerical position with a big corporation. There is little left that allows of individual initiative, except the farm. Anything, therefore, which opens up for us a new vista must be of value, and many of us have sons and daughters, and we should like to be advised in due time of the opportunities that yet exist in the United States for individual initiative and individual enterprise. It seemed to me, therefore, that in what is being done in the west there might be a message for all of us.

"Riparian" is an English word, coming from the Latin word "ripa," meaning bank. Riparian rights, therefore, as they are known to the law, mean simply the bank rights of an owner whose land borders a stream. These rights of such an owner in America are very few. Practically they are the mere right to sit on the bank and watch the stream gurgle on down to your neighbor, with no substantial right to divert, with no substantial right to absorb any part of it.

It must be apparent that under such rights the West could not be reclaimed. The West, before it could proceed, had to rid itself of riparian rights, at least as we know them in the rain belt.

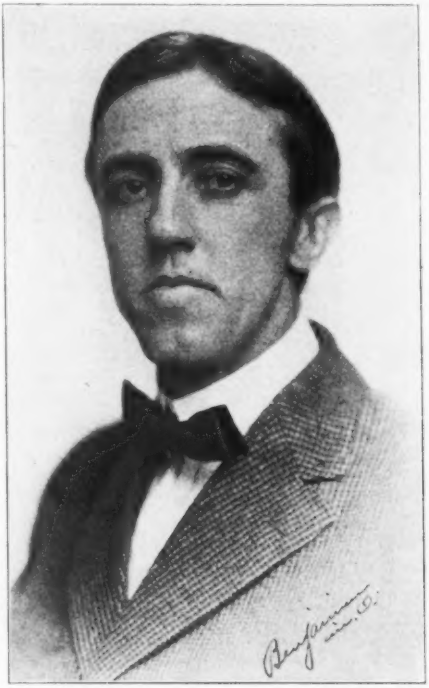
In the state of Colorado, which has always led in irrigation law, those who framed the Constitution of that state in 1876, when it was admitted to the Union, were very fearful that some lawyer at some time would get the notion that the old eastern riparian rights existed in Colorado; and hence that state, in its Constitution, provided that riparian rights should not be recognized at any time by the legislature or the courts, and it solemnly declared that irrigating rights should take the place of riparian rights, and that the water of the streams of the state of Colorado should be deemed public property rather than private property. The other states of the West followed the rule laid down by Colorado, and thus you had erected a legal condition under which irrigation could proceed; for under irrigation rights, the water is open to him who appropriates,—he is permitted to do what the riparian-rights man could not do, *i. e.*, divert the stream.

Now, America has a great arid belt. There are sixteen states of the American Union having in them millions of acres subject to long periods of aridity. Of course, even in those localities there are frequent storms. The whole of the Republic of Mexico is arid, and yet they have what they call their "diluvias," coming at the wrong time, and bringing altogether too much water, doing no good, and wrecking vast property. And it is just so in the arid states of this Union, where the work of reclamation is going on. In that portion of America the United States government has an immense territory. This land, owned by the government, is what is known in the law as "the national domain." Of course, in a certain popular sense, every acre of land in the United States is a part of the "national domain," but in the legal sense that land only belongs to the "national domain" the title to which is in Uncle Sam.

A great many people have the notion that irrigation rights, as they are known

in the west, are new. They are very old, indeed. The oldest civilizations of the world were civilizations that grew up under the influence entirely of irrigation. Whether you take Chaldea, or Assyria, Babylonia, or Egypt in its entirety, you have civilizations growing up under the influences of irrigation.

In a British museum there is a tablet which has long defied the efforts of the archæologists to explain. It apparently represented a young man who came to the presence of the King, where a considerable dialogue took place. After much study, the scientific men came to the conclusion that it represented a soul appearing before the god Isis. Isis was saying, "What have you to recommend yourself?" And the little fellow pauses, and finally he says, "Oh, Isis, I have never stolen any irrigating water." That simply meant that when that soul was in Egypt he had all the virtues that went to make a good citizen and a good husbandman,—he had respected the ditches and brought life to Egypt.



HON. STANLEY E. BOWDLE

The West has its difficulties, which difficulties are being rapidly met, however. The localities in which the irrigation work is going on lead you to think that we are reclaiming only small portions of the arid West. For illustration, I will refer to the immense irrigation enterprises carried on in and about Rockyford, Colorado. Seventeen years ago, when I went to Colorado for the first time, Rockyford was scarcely on the map. To-day, in going West, just after you leave the Kansas line, you run into a wonderful district 12 miles square, and every acre under marvelous cultivation; and this district, unheard of a few years ago, last year paid to the Atchison, Topeka, & Santa Fe Railroad $1,000,000 in freight rates. (That district shipped out 200 carloads of cantaloups alone, to say nothing of beets, honey, alfalfa, and dairy products.) Such is the work accomplished by private enterprise in Colorado alone, and it is but a sample of the vast works of reclamation distributed throughout the arid West.

But this work of reclamation, involving as it does the repudiation of riparian rights as we know them, has given rise to some perplexing legal difficulties. For instance, six years ago the state of Kansas brought suit in the Supreme Court of the United States against the state of Colorado. (A number of the ablest irrigation lawyers of the nation were engaged on both sides.)

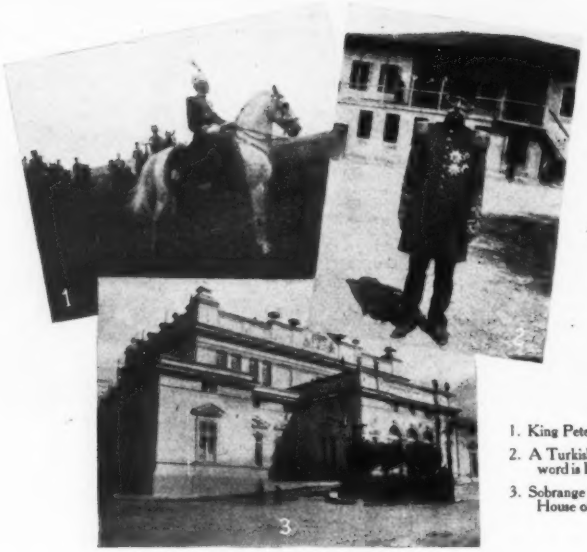
The case arose over the claim made by the state of Kansas that the state of Colorado had practically intercepted the Arkansas river at Rockyford, and was proceeding to absorb almost the entire flow of the stream, thus destroying the riparian rights of Kansas. Now, three fourths of Kansas is in the rain belt; three fourths of Kansas therefore was interested in riparian rights. The state of Colorado was not interested in riparian rights, and they said, "We are supreme within our state limits. We may

Lettuce Crops Grown by Irrigation in Yuma Valley

do that which we care to do with the streams within our limits, so long as those streams are not navigable streams, over which Congress would have jurisdiction." The state of Kansas replied, "You are not supreme within your own limits, if exercising your rights of supremity you cut off the Arkansas river." It presented an enormous difficulty in the Supreme Court of the United States, but was solved.

Justice Brewer said to Kansas, "You in your legislation have also been in the habit of recognizing irrigation rights for your west one fourth. You cannot say that you are a riparian state entirely. You are half riparian and you are half irrigation. How, therefore, can you make so serious a complaint against the state of Colorado?" (I am, of course, paraphrasing.) The case, however, was decided on the theory that the use that was being made by the state of Colorado of the Arkansas river was so immense, the work of reclamation was so valuable to Colorado, and the nature of the injury inflicted upon the state of Kansas was at that time so overbalanced by the good of reclamation in Colorado, that the court would not issue the injunction. But Justice Brewer went on to say, that if the absorption of the waters of the river increased with time, there might arise a situation in which the government would be obliged to interfere with the state of Colorado. . . .

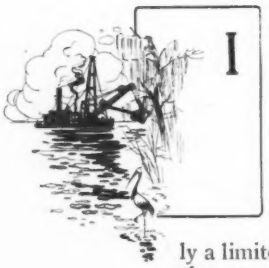
I have often been asked the question, How does it come that the United States government can engage in such large almost socialistic enterprises, as building dams, reservoirs, and irrigation canals? Why cannot the government undertake certain great needful work here in the East? The answer is this: In the West, Uncle Sam is a great landlord; and it so happens that the Constitution of the United States gave him power "to make all needful laws and rules for the government of the territory of the United States." Under this power, and indeed without this power, the government has authority to do for its own property what a private owner can do. It must be apparent that Uncle Sam is not any less the owner of his own property than a private person would be; and if a private individual might undertake any sort of a scheme for the reclamation of his arid land, so can Uncle Sam. In the East the government is no longer a landowner. It has nothing to reclaim, hence we see no great governmental works undertaken. Our government ownership here in the East is limited pretty much to our great navigable streams, and over these we are exercising our ownership by doing great works quite analogous to the work being done in the West.—By permission from address before Ohio State Bar Association.



1. King Peter of Servia.
2. A Turkish Pasha. His word is law in his District.
3. Sobrange or Parliament House of Bulgaria.

Law Making in the Turbulent Balkans

BY FELIX J. KOCH



IT is indeed a study and story in contrasts,—the whence of the laws that govern the peoples of those turbulent Balkans! On the one hand, Turkey,—supposedly a limited monarchy, since the new Turk came into power,—but "limited monarchy," giving a hand in the rule to the Mussulman only, and leaving the Christian as abject a slave of the ruling Pasha as any serf of Asiatic Russia; on the other, there is Montenegro, where every man is a soldier, knows his rights, worships the ruler, and will shed his last drop of blood to enforce the laws of Csarnagora. And then there are governments betwixt and between.

For example, there is Servia. In Servia to-day the Parliament may actually make or frame or pass the laws, but the extent of their enforcement, and, after all, the source of their initiation, lies with a small clique of the military, better known as the regicides. In Servia,—at the capital,—you will find Army officials intrusted with this or that high office of law enforcement. To-day they are uniformed and heavy with *chevrons,* but folks tell you their particular rise to power came through some phase of their aid toward the murder of the late King and Queen.

The tragedy was one which shocked Europe. A King, a Queen, a minister of state, a servant or two, murdered in the night in truly Macbethan fashion, and

the bodies tossed through the palace windows into the streets, in order that any and all might see and so quiet all doubts as to their actual extinction.

You or I may hold up our hands aghast, but the Serbs are really a law-abiding folk, and they tell another story. In order to produce a like reign of law, they state, it took the entire French Revolution to do, in France, what the murder of five people did in Servia.

Queen Draga, of Servia, was a known harlot, and the women of the Serb aristocracy refused to associate with her. She took out her revenge, through the King, on their husbands. Men were refused promotions or even lowered in rank on slightest pretext. The most dissolute characters were advanced over their heads. Servia was in foment,—and then it happened.

Had they merely exiled the King or even the Queen there would always have been a party, looking, of course, to advancement under the Restoration, striving to bring them back. That would have been one cause of perpetual discord.

Wherefore—the murder; and to-day little Servia is indeed a law-abiding land. So eager are the people to keep the law that a stranger, in the smaller towns, is spied on by all,—lest he do mischief; and in our own case we were arrested, on their complaint, for no worse a crime than taking color notes of a wedding procession on the highway. We might have been sketching the military road, you see, and so bringing harm to Servia.

In Turkey, as suggested, the pendulum swings the other way. Whatsoever the mock Parliament at Constantinople may do, the Sultan, his viziers, and, under them, the Valis, or province governors, really rule about as they see fit. The final unit,—the county,—as it were, in Turkey, has its law enforcement left in the hands of a Pasha, who has, in most places, power of life and death.

The Pashalik, his official residence, is the finest structure in the county. At its rear is a veranda, on which he sits to listen to the military band, which plays when the notion may seize him. Across from that seat of state is the administration building,—its lower floor the prison, where offenders against the laws are incarcerated.

Strange place, that prison. The bars open directly on the court, and so prisoners enjoy all the benefits of fair weather. But when it rains, it rains into the prison; when it snows, in the Sandchak uplands,—it snows into the prison. People of the town take it as a deed of charity to step to the bars every so often and feed the prisoners, as you or I might some pet bear at the Zoo. Within the prison wall there is just one huge cell, and whether you be guilty of blaspheming the prophet, or whether you have killed a Mussulman and are awaiting death sentence, you are in one and the same "box."

The origin of much of the lawbreaking in the Empire is, of course, the abominable tax system. Taxes are meted out from above. The Sultan tells the Vali, say of the province of Adrianople, that he must yield so much tax this year. The Vali adds a proportionate amount to pay himself, maintain his court, and then divides that sum among the district governors. Each is advised that his district must yield so much this year. This petty autocrat adds his own salary and squeeze, and then divides the amount among the county rulers. And they—

Well, instead of making a tax valuation, and then having it collected, they employ publicans. Men bid, each year, for the taxes of the given county. The one who pays the Pasha the largest amount is, of course, the winner. He pledges to pay the Pasha, at the close of the harvest, so many thousand *medschidje*. To help him get it, all the military, all the authority of the Porte, is invoked.

He comes to so-and-so, who's been raising millet, let us say,—and demands his tithe,—for the tenth is the great tax of the region. The peasant complains that the measure is bulged; the tithe unfair. Well and good, the publican will send to Constantinople for another,—meantime he'll collect elsewhere. And meantime—which is going to be weary weeks—the peasant's millet is ripe for the harvest, ripe for the granary. Storms drench it, it is rotting away, but not a blade may be harvested until the Sul-

tan's tenth is gone. The peasant stands to lose all his crop, and his friends deride him for his folly. When, in due course, the "new" measure arrives, the law allows the publican to take the equal of the original tithe out of the remainder that may be unspoiled.

Then there's another law that does havoc to the Christian. This is that it is not perjury for a Moslem to swear falsely against the infidel. Nor is it sin for a Moslem to break the most solemn oath given a Christian; which means that any number of crimes can be committed against the Christians, and their Moslem perpetrators blandly swear they know nothing about them. Just for example, there is a law which requires every Moslem to serve five years in the Armies of the Sultan. Christians, instead, are forced by law to pay a so-called war tax. *Backsheesh* will free many of them from this; but one must know how to apply it. Every male, from the year of birth up to the age of eighteen, pays a matter of 83 cents—four days' earnings of a full-bodied peasant—as this tax. If such child die, though, for a year or more after, the Christian must pay the tax; for the authorities purposely delay filling out the death certificate, and the publican will take no one's word that the child is dead,—professing to believe him off in hiding.

In contrast to this reign of autocratic law is the freedom and ease of the Bulgarian. Notably since Ferdinand has thrown off the Turkish vassalage has the little upland Kingdom prospered.

Its laws are modern indeed,—and the place of their making bespeaks the tastes of the law-makers.

Travelers on the Oriental Express, dropping off at Sofia, make a visit always to the Sobranje, or capitol building. The building is a two-story one, the exterior coated with the yellow-plastering so common in the region, and bearing no evidence of graft in its erection. Just opposite is a splendid equestrian statute of Alexander II., erected by Russia as a gift to the land.

The center front of this building protrudes a trifle, and, with a shield set on its top, it adds certain strength to the whole. One enters through this fore hall, neatly white-plastered, into another corridor, serving as hat room. It seems strange that national Parliament Buildings should maintain so primitive a cloak arrangement as this.

From that hall you continue into the main Parliament chamber,—of course a good-sized room that. At right and left is a balcony, part of the space beneath it walled off. At the center, the chairs of the members are grouped, leading on to the rostrum. The effect of the room is white, with panels of a pale cream, richly adorned with decorations in gold for relief.

A door, at the rear of the Parliament chamber, admits into the library, a large, square room as well, lined with innumerable small, separate bookcases. Here, in the summer, when the Sobranje is overhauled, are stored the pew-like seats of the law-makers,—each a bench divided into seats, and having at its rear the desk for the persons behind. Evidently law-makers, the world over, are much the same,—nations provide libraries, but law-makers don't use them, and between sessions the books gather dust.

At the rear of the library there's a bar and a lunch room; from these you go on into the hall, that leads away to a newspaper room, racks of the papers on the bamboo splints, hangings on every wall. Three green-baized topped tables are crowded with weeklies,—while from the walls two paintings of Czar Ferdinand look down on a floor of plain offices.

Round about here are side rooms devoted to offices, plain in their furnishings. A stair at the rear leads upstairs into another corridor, with more offices, that ends at a reception chamber. Paintings on the walls, chairs of neat upholstery, a throne,—in case of necessity,—show the Bulgars to be able to put on appearance where and when they feel needful. And in the room for the stenographers, near by, a typist at work on the design for a menu, the whole done in the signs used in shorthand,—show that these men have perception of the artistic. For simplicity this House of Parliament commends itself,—it marks one extreme of the Balkan capitols. In Cetigne they have a still simpler structure.

Editorial Comment

"The servitude of the rivers is the noblest and most important victory which man has obtained over the licentiousness of nature."—Gibbon's Decline and Fall of the Roman Empire.

Case and Comment
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Edited by Asa W. Russell.

Development and Use of Water Power.

EVERY river in the United States capable of creating hydro-electrical energy is increasing daily in importance. Each is the source of an actual or potential supply of "white coal" upon which the nation must eventually depend for its light, heat, and power. Each succeeding generation will be infinitely more interested in this question than we are. As the coal and the timber grow scarce, the water powers will become of supreme value. Their ownership and control is a vital problem which has become one of the great questions of the day. Everywhere private interests are attempting to gain control of vantage points for development. Unless the public, in both nation and the states, asserts its authority and controls the use of water for the benefit of the public, an intolerable water monopoly will be fastened upon the people.

The next great development in the question of conservation of water power and the control of water power projects by public authority apparently will be a battle in the courts to determine where the Federal jurisdiction begins and the state jurisdiction ends. It is becoming more and more apparent that, until the Supreme Court passes on this question, it will be impossible to get any concert of action in Congress in this highly important matter. The Connecticut river dam case, which is up to the Senate now, is an illustration. The Niagara Falls bill, which is pending in the House, is another.

A powerful and able school of lawyers in Congress maintains that the state, and not the Federal government, has the power to control water power arising from the damming of navigable streams. But it is a remarkable fact that the states have not exerted their rights. Big water power rights have been taken out under the noses of the state authorities; and the states have exacted no compensation, and not attempted, as a rule, to exercise control over rates.

But it is clear some of the states are stirred up, and are going to insist on control if they have a right to it. It would mean heavy revenue to some of them.

The attention of our readers is called to the leading article in this number by Mr. Rome G. Brown, of the Minneapolis Bar, in which is presented an able, learned and timely discussion of the ownership of water powers. This is a subject which he has been called upon to ar-

gue with the War Department, before the National Waterways Commission and before the Commerce Committees of both the Senate and House. In his opinion, the Federal Government has no proprietary interest in water powers. He regards the question of proprietary rights as purely a state question.

The Unity of Our River System.

THE national irrigation act became a law on June 15, 1902. "Since then," states Mr. George H. Maxwell, "the work of the National Irrigation Association has never ceased for a day. It has broadened out into fields of wider usefulness and larger national importance. It now includes the entire territory of the United States. As time passed, the evolution of events made it more and more manifest that the great national problem of the control of flood waters for beneficial uses, so vital to the arid region from the standpoint of irrigation, is equally vital to every section of the United States from some point of view. In one locality it is flood prevention, in another it is irrigation, in another drainage, in another power development, in another it is the necessity for the control and purification of streams in order that their life-giving waters may be kept free from all danger of disease, in another it is the necessity for harnessing the floods of winter, in order that they may in summer float commerce on our inland waterways.

"As one year has followed another, and it has gradually come to be clearly understood that every river system must be dealt with as a unit, and that the water and water-way problem is one and indivisible, in all its branches and ramifications, this comprehensive and enlightened view has finally found expression and been embodied in the Newlands-Bartholdt river regulation bill."

This bill provides a continuing appropriation of $50,000,000 annually for ten years, for the building and maintenance of necessary levees, and for other works of a protective nature; and the organization necessary to enable the Federal government to harness the source streams of the great rivers in such manner as is necessary to permit the use for irrigation, for power, and for dry-weather navigation, of the flood waters that now go to waste in destructive torrents. Its application is general, and all of the great rivers come within the scope of its operations.

Its advocates assert that the enactment by the Federal Congress of the Newlands river regulation bill will not only clear the way for the control of the great rivers of the country in a sane and permanent manner to the end that floods will no longer devastate the low country, and washing freshets denude the hills, but that it will solve a number of other economic problems of great importance:

That will put an end to wasted waters, wasted energy, and impeded navigation.

That will make possible the irrigation of millions of dry acres and the drainage of millions of wet acres.

That will make available the richest soils of the continent to the homeseeker and to the toiler.

That will reduce the cost of living, because it will change what is now our greatest agency of destruction into our greatest agency of production,—the production of food from millions of now untilled acres.

In itself the Newlands river regulation measure embodies the most potential and most far-reaching economic principle ever brought before the lawmakers of the country for the immediate and future good of all the people, that of constructive co-ordination of Federal functions for the prevention of want through the prevention of waste. Under its provisions, it is said, the mountain slopes will be forested, the uplands saved from soil erosion, the dry lands supplied with moisture, the rivers made navigable all the year round, the lowlands protected from floods and overflow, the waters conserved and turned into a national asset, and the wet lands drained, and all for what purpose? To make homes for the people and to safeguard those homes from the destroying forces of nature; to create power for the economic production of the implements and labor-saving devices necessary to make life a pleasure in place of a struggle; to reduce the

cost of living; to create prosperity for the merchant and for the brain worker, and for the men and women who must work with their hands.

Soon or late it would seem that the Newlands plan of river control, or some modification of it, will rule the streams of the United States, because the levees alone will not hold a flood that is constantly undermining them, or climbing over them, or doing both.

The acceptance of any such plan as this would mean the transfer of all control of the levees and all responsibility for them to the Federal government.

In a recent explanatory address, Senator Francis G. Newlands points out that his is the first comprehensive measure designed to nationalize the flood water and river regulation problem. He stated that from Pittsburg to San Francisco, from St. Paul to New Orleans, the flood water problem has become an acute issue; that the average annual property losses from floods amounted to nearly $100,000,000, which was one fifth of the amount he asked for the furtherance of a plan that will abate for all time such tremendous losses, and increase land values, the productivity of large areas, and serve the highest purposes of coast and inland commerce. If the government has seen fit to expend $400,000,000 on a single water way (Panama canal) how much more it would mean to the people of the country to turn deserts into farms, swamp lands into ranches, foothills into orchard regions, and stop for all time the devastation by floods. To impound the flood waters, to create storage, to provide for distribution of water to thirsty valleys,—to conserve and distribute the life-giving element may be termed the fundamental objective of the Newlands measure. The Senator pointed out that the Panama canal had gone forward in such magnificent form, free from graft and incompetency, a monumental accomplishment of the operation of the collective principle in government.

The great flood of 1912 has demonstrated that the national government only can obviate a recurrence of such overflow disasters in the future by a national policy under which an adequate levee system will be built and maintained as national fortifications against invasion and destruction by the forces of nature.

In working out plans for flood prevention and the protection of the lowlands of the Mississippi valley from overflow, it is urged that the Mississippi river and all its tributaries and source streams should be treated as a unit, and a comprehensive and adequate levee system, to be permanently maintained by the national government, should be supplemented by a system of reservoirs on the headwaters of the Ohio and its tributaries, and also on the upper Mississippi, and by a system of flood water canals and storage reservoirs in the Missouri river valley, by means of which the flood plane at Cairo would at all times be so reduced that no combination of high water in the three upper rivers would ever create a great flood in the lower Mississippi valley, and at the same time prevent overflow and damage by floods in the valleys of the Ohio, the upper Mississippi, and Missouri rivers. It is evident that the nation cannot longer afford to permit its resources of soil, of power, of water, and of navigation to be carried as a wasteful and destructive flood to the sea. If the states themselves cannot, in the general interest, prevent this waste, the Federal government should conserve such floods at their sources, and subject the now wasted waters to beneficial use.

Readers' Comments

Government by Caprice.

We, the people of the United States, to quote from a much construed and latterly somewhat discredited organic law, have one faith that endures and expands.

True most of our beliefs have been shaken and our popular ideals dimmed. The tale of the cherry tree and the hatchet, Pocahontas's moving story, and the prophetic power of the ground hog, no longer obtain full credence. We are no longer so warm toward the hero of Manila Bay, nor so cock sure that all men are born equal.

Yet our faith in the efficiency of statutory law, or, at least, our enthusiastic demand for its enactment, steadily grows.

In "Alice in Wonderland" the princess applied a direct process to any situation not in keeping with her whim. "Off with his head" removed the objectionable individual and renounced all his works.

For this favored land of freedom we have a less sanguinary method. We simply enact a law. The American statute, whether passed by Congress or state legislature, knows no such word as fail. Its stout heart quails at no undertaking. It is omnipotent and omnipresent. It fixes the length of a bed sheet in Texas and the size of a waiter's tip in Milwaukee. It forbids cigarettes to the callow youth of Indiana, and does not tolerate hatpins more than a yard long in Chicago. In Oklahoma it requires one man to pay the other fellow's debts, and in Tennessee affords to the majority the holy joy of keeping the minority thirsty. It is the national specific for all public ills. Denied a state church, we have what suits us better—a national fetish. All things are from thee, O Statute! Give us more law is the insatiate cry.

One, at least, among the continuous supply of enactments seems a sure way of perpetuating a name. Much surer than that of Mr. Andrew Cannyscot. While everywhere startling innovations in architecture assail the eye, these have failed of their real purpose. All are known as public libraries,—none as Cannyscot libraries.

His brother led an army from Atlanta to the sea, but the man I have in mind was wiser, for he produced a statute, now usually called "the Sherman law." The Army man has a plat of ground at Washington and a town in Texas named for him, gets loyal reference once a year at Army reunions, and has mention in school histories. Yet not because of his deeds has the name of Sherman been printed and spoken millions of times within the fortnight, but because of the doing of John in securing his "law." Long since he joined the other John, but his law goes marching on.

Its youth was spent out West among grain elevators and railroads, and finally wound up in New York with the tobacco habit. Naturally it was dragged into court in divers jurisdictions, and at times was almost dismembered. Finally in a room adjoining its birthplace it was presented for christening. "Name this child," two administrations thundered! After reams of family history, the chief justice answered, "Unreasonable Restraint."

A wayfaring man might conclude in his haste that after all this the Sherman law was assured useful manhood and serene age. Not at all! Unselfish reformers, keen to foil "the interests" by the simple expedient of getting offices for themselves, at once proposed more statutes,—some to amend; some to repeal. All with the wholesome idea of making irresistible its benevolent power to upset business and balk enterprise.

Yet the people, not conforted, besought other laws, and got one in the shape of the Interstate Commerce Commission with puzzling powers, the most pleasing of which was its power to make more laws and interpret them for itself. It chortled over this opportunity, but showed rare self-restraint. It forbade to require the railroads to furnish *data* to show what the general manager paid for his wife's hat, and reserved for further consideration the question as to whether the rate tariffs should also be printed in raised letters for the benefit of our citizens who are physically blind.

This, however, it did accomplish. It brought a large part of our population from other gainful pursuits to engage either in guessing at what the law meant, or in trying to comply with the Commission's regulations.

The amount of pulp required for the paper for reports blasted Pinchot's forest hopes, and the floor space of railroad offices expands until mayhap later there will be no room whereon to build streets.

Naturally there must be another law. Why not? Forthwith a commerce court appeared, to supervise the doings of the Commission. Natural history furnishes an authority for such action:

"Big fleas have little fleas upon their backs to bite 'em,
And little fleas have lesser fleas, so on—*ad infinitum.*"

But the court had scarcely gotten acquainted with its furniture and smoothed its silken gown before another law was passed to wipe it out. This latter law will not be pressed until we Democrats can elect a President to approve it.

Yet to our zealous citizenship the present system of getting new laws is tiresome and dilatory. A Republic upon whose territory the sun shall never set until Aguinaldo conducts a successful revolution, cannot be expected to have laws baked in a slow oven. The extremity always brings the man, and under the

leadership of Senator Pompadour a scheme has been devised to assure a bumper crop of statutes.

We are to have the initiative. As now proposed it is open to the sound objection that several citizens are required to combine in order to have a new law; but this will be improved, and soon each one of us may be able to initiate a law of his own, and, with the blessed aid of the referendum, have the other fellow's law referred to and repealed by the party of the third part.

Finally the citizen takes bond of fate in the shape of the benign "recall." Thus skulking enemies in the guise of construction shall be put to rout, and such trifles as the Constitution or the right of the individual no longer permitted to block the progress of true reform.

New Albany, Ind.

COL. CHARLES L. JEWETT.

Civil Service.

The protection afforded employees of the government by the civil service law is not thoroughly understood.

The law prohibits, in effect, the removal of persons employed under the classified service, for political or religious reasons. Therefore in the investigation of complaints, it appears that the civil service commission has no authority or power, where no element of politics or religion can be alleged or proven in the case. It is true the employee may demand the reasons for the action detrimental to him be assigned, and have opportunity to answer. The statement of the commission, in its nineteenth annual report, sums the matter up as follows: "The civil service law itself provides for no permanency of tenure. Any employee can be dismissed at any time, but the old motive for making dismissals is gone, as the new appointments are not made through favoritism or influence. Removals are much fewer than formerly. To this extent the act has promoted a permanency, and a very much smaller proportion of persons are removed from the competitive classified service than from other parts of the service."

What, then, is the remedy of the injured employee if other motives are ascribed by his superior? Surely no well-informed official would set up the prohibitive ones,—even if the true incentive. The answer is, if the case be one where the power of enforcing this discipline rests in the discretion of the superior officer, usually there can be no redress assured. The courts will not interfere with the exercise of an official's discretionary powers. If there were no lawful authority, however, resting in his discretion, he might be compelled by mandamus proceedings to reinstate the aggrieved party, or perform acts of a ministerial nature. The right of redress is greatly limited because, as in the usual case, there can be no review of the facts by an appellate tribunal. Sometimes the pay illegally deprived can be recovered through the court of claims. But where the official who makes charges against his subordinate within the classified service has vested in himself certain discretionary powers, he is—save Congress—the court of last resort, and at the same time judge, jury, prosecuting attorney, and executioner, and the civil service commission will have no jurisdiction.

L. B. PERKINS.

Washington, D. C.

Justified by the Record.

Editor Case and Comment:—

In your issue of January, 1913, Wilbur F. Bryant, of Hartington, Nebraska, writes in regard to the communication in your magazine for July, 1912, of T. L. Jeffords, with reference to the acceptance of the plea of guilty by a person possibly insane, and cites the case of the Commonwealth against Edward W. Green, and says: "It is passing strange that this precedent appears to escape the attention even of people in Massachusetts."

If Mr. Bryant will refer to your issue of August, 1912, he will find that the Green Case was not only cited by me, but that I quoted quite liberally from the opinion of Chief Justice Bigelow, who wrote the opinion in that case.

JOSIAH S. DEAN.

Boston, Mass.

You cannot settle the question of conservation while monopoly is close to the ears of those who govern. And the question of conservation is a great deal bigger than the question of saving our forests and our mineral resources and our waters; it is as big as the life and happiness and strength and elasticity and hope of our people.—*Hon. Woodrow Wilson in February World's Work.*

Among the New Decisions

There is no virtue so truly great and godlike as justice.—Addison.

Attorneys — extortion — compelling transfer of property by threats. Threatening a man who had deserted his wife and was living in adultery with another woman in another state, with criminal prosecution and extradition unless he secured the release of an attachment of property left by him in the state, under a note which he had given his paramour, and gave his wife a bill of sale, and paid her the sum of money to which she was justly entitled, is held in Re Sherin, 27 S. D. 232, 130 N. W. 761, to be extortion for which an attorney may be disbarred, where the statute defines extortion as obtaining property from another with his consent, induced by the wrongful use of force or fear.

The decisions treating of extortion or robbery as affected by right, or belief in right, to the property sought to be secured, are presented in the note accompanying the foregoing case in 40 L.R.A. (N.S.) 801.

Carrier — assault on passenger — excess of agent's authority. A railroad company is held in the Tennessee case of Neville v. Southern R. Co. 146 S. W. 846, to be liable for an assault by its station agent upon a passenger waiting in the station to take a train, although it grew out of a discussion concerning business in which the railroad company was in no way interested.

The liability of a carrier for the wilful torts of his servants to passengers is discussed in the note which follows this case in 40 L.R.A.(N.S.) 999.

Carrier — delivery of contents of car — entry for removal. The question as to when delivery of a shipment of goods to the consignee is complete, so as to relieve the carrier from all further responsibility, either as carrier or as warehouseman, although the goods in fact remain in the car in which they have been transported, was considered in the case of Rothschild Bros. v. Northern P. R. Co. 68 Wash. 527, 123 Pac. 1011, annotated in 40 L.R.A.(N.S.) 773, holding that a delivery of the contents of a car by the carrier to the consignee is effected by placing the car on the delivery track, and its entry by the consignee for the purpose of removing the contents after the surrender of the bill of lading, although the property has not in fact been taken from the car.

Carrier — duty to furnish special trains. The precise question as to the duty of carriers to run special trains seems to have been considered for the first time in Atchison, T. & S. F. R. Co. v. Tiedt, — C. C. A. —, 196 Fed. 348, 40 L.R.A. (N.S.) 848, holding that neither the owner of an amusement park, nor special groups of persons desiring to patronize it, can compel a railroad company to furnish special trains for the use of such persons, although special trains are fur-

nished for persons desiring to patronize another amusement park in the same vicinity.

Carrier — terminal station — beginning of passenger's relation. The relation of one purchasing a ticket at the station of a terminal corporation, and the carrier whose train he is to take and which is by law compelled to use such terminal, is held in Hunt v. New York, N. H. & H. R. Co. 212 Mass. 102, 98 N. E. 787, annotated in 40 L.R.A.(N.S.) 778, not to become that of passenger and carrier until he is about to enter the carrier's car.

Conditional sale — proposed illegal use — estoppel — waiver. A conditional vender of an automobile is held in the Arkansas case of Watkins v. Curry, 147 S. W. 43, annotated in 40 L.R.A.(N.S.) 967, not estopped from reclaiming the property upon failure to make the payments, by the fact that he knows that the purchaser intends to use it as a prize in a contest to increase a newspaper circulation.

Nor is he prevented from reclaiming the property under the contract, by the fact that the purchaser intends to use it in a lottery, if such use was entirely independent of the contract.

Neither does he waive his right to reclaim the property by extending the time for payment after he learns that the property has been offered as a prize in a contest to increase a newspaper circulation, if the time expires before the contest closes.

Conditional sale — assignment of interest — effect. Under a sale on condition that if the vendee shall sell, mortgage, or pledge the property or fail in payments, the vendor may take immediate possession of the property, and hold it free of all claims from the vendee, it is held in Dame v. Hanson, 212 Mass. 124, 98 N. E. 589, that the vendee may confer an interest on an assignee which will enable him to perfect the title by full payment of the purchase price, and the attempted assignment does not forfeit all rights under the contract.

The question of the assignment or transfer of a purchaser's interest under a conditional sale is discussed in the note accompanying the foregoing case in 40 L.R.A.(N.S.) 873.

Corporation — libel by directors — duty to reimburse company. Directors of a corporation who maliciously, and to gratify their own personal ends, circulate a libel for which, although it is *ultra vires,* the corporation is held liable, are held bound to reimburse the corporation for the loss thereby caused to it, in Hill v. Murphy, 212 Mass. 1, 98 N. E. 781, 40 L.R.A.(N.S.) 1102, which seems to be the first decision upon this precise point.

Corpse — prescriptive right to burial. That no prescriptive right which will descend to heirs can be acquired by burying dead bodies in private grounds is held in the Missouri case of Wooldridge v. Smith, 147 S. W. 1019, which is accompanied in 40 L.R.A.(N.S.) 752, by a note in which the decisions on prescription or adverse possession of a grave or burial lot are gathered.

Courts — jurisdiction — act of Congress — state authority. That state courts may, on the ground of comity, take jurisdiction of actions by employees to recover damages from railroad companies for personal injuries arising under the employer's liability act of Congress relating to interstate commerce, of April 22, 1908, is held in Bradbury v. Chicago, R. I. & P. R. Co. 149 Iowa, 51, 128 N. W. 1, annotated in 40 L.R.A.(N.S.) 684.

Divorce — remarrying — contempt. Going into another state, marrying, and immediately returning to one's domicil, is held in the Michigan case of Ex parte Crane, 136 N. W. 587, not punishable as a contempt of the court rendering a divorce decree and forbidding the divorcee to remarry within a specified time, as required by a statute, if the penalty provided by statute for such remarriage is punishment for bigamy.

The decisions treating of marrying out of the state contrary to a decree, as contempt of court, are gathered in the note appended to the foregoing case in 40 L.R.A.(N.S.) 765.

Eminent domain — securing material for grading railroad. Securing property from which to take materials to raise the grade of a railroad track and strengthen the embankment, which had been injured by floods, for the convenience, safety, and security of the public, is held in State ex rel. Great Northern R. Co. v. Superior Court, 68 Wash. 572, 123 Pac. 996, annotated in 40 L.R.A.(N.S.) 793, to be a public use for which the power of eminent domain may be employed.

Evidence — entries in books. Under the provisions of the statute that entries in books intended as records of payments and similar matters, made in the regular course of business, at or near the time of the transaction, shall be admissible in evidence on proof that they were so made, it is held in the Kansas case of Richolson v. Ferguson, 124 Pac. 360, 40 L.R.A.(N.S.) 855, that the fact that a corporation made certain payments may be shown by its books, although it is not a party to the action.

This seems to be the first case to pass upon the question as to payment by a debtor as evidence as against a third person, of the previous existence of the indebtedness.

Evidence — suretyship — admissions of principal after termination of employment. The O. K. by an insurance agent who is required to remit, for business done, within two months after the expiration of the month in which it is transacted, of a statement of amount due by him to the company within such time, after he has resigned from his position, is held in United American F. Ins. Co. v. American Bonding Co. 146 Wis. 573, 131 N. W. 994, to be admissible in evidence against his surety in an action to hold him liable for a defalcation, since the duty to remit did not terminate with the resignation, and statement as to the amount due, made within the time during which his contract required him to make remittances, was part of the *res gestæ*.

The admissibility against the sureties on a bond, of statements made by the principal after the expiration of his term of office or employment, is considered in the note accompanying the report of the foregoing decision in 40 L.R.A.(N.S.) 662.

Interstate carrier — conflict of laws — refusal of shipment. A state statute forbidding carriers to bring intoxicating liquors into localities where prohibition laws exist is held in Louisville & N. R. Co. v. F. W. Cook Brewing Co. 96 C. C. A. 322, 172 Fed. 117, to be no defense to a proceeding instituted in a suit against the carrier to compel it to accept liquors for transportation to such localities, and it is immaterial that the carrier was chartered in the former state and has covenanted to obey its laws.

The duty of a carrier to accept liquor for transportation to points where its sale is prohibited or restricted is considered in the note appended to the foregoing case in 40 L.R.A.(N.S.) 798.

Intoxicating liquor — ordinance forbidding treating. While the prohibition of treating has been quite generally discussed and advocated as a temperance measure, Tacoma v. Keisel, 68 Wash. 685, 124 Pac. 137, 40 L.R.A.(N.S.) 757, appears to be the only case involving an attempt to put such a policy into law. It is authority for the following propositions:

That authority to forbid treating in saloons is conferred upon a municipal corporation by a charter empowering it to regulate the selling and giving away of intoxicating liquors, and to make regulations necessary for the preservation of peace and good order within its limits.

That an ordinance forbidding the keeper of a saloon to permit liquor to be bought by one person and drunk by another in his place of business is not so unreasonable as not to be within the provisions of a charter empowering the municipality to regulate the selling and giving away of intoxicating liquors, and making regulations necessary for the preservation of peace and good order within its limits.

That there is no inherent right in a purchaser of intoxicating liquor to offer it to another in a saloon as an act of hospitality, which cannot be taken away under the police power of the state.

That the keeper of a saloon is not deprived of his property without due process of law or of the equal protection of the laws, because he is made punishable for permitting treating in his place of business, while the persons purchasing the liquor are not punished for doing the treating.

Judgment — on judgment note — absence of process. A judgment purporting to be by confession of attorneys in fact, on a note, commonly called a judgment note, on warrant of attorney therein, purporting to empower and authorize the payees or agent, or any prothonotary or attorney of record, to appear for the makers and in their names, and confess judgment against them in favor of the payees, for the amount, with costs, and release of errors, entered by the clerk, in the clerk's office, in vacation, without process executed on defendant and declaration filed, is held in the West Virginia case of A. B. Farquhar Co. v. De Haven, 75 S. E. 65, to be illegal and void on its face; and any execution issued thereon is also without warrant of law, illegal, and void, and on motion of defendants should be quashed.

The validity at common law of a warrant of attorney to confess judgment is treated in the note appended to the foregoing decision in 40 L.R.A.(N.S.) 956.

Master — duty to furnish sufficient helpers. That a master cannot be held liable for injury to a servant merely because he did not have a sufficient number of men to do the work safely, if he did not know, or the exercise of ordinary prudence would not have charged him with knowledge, that the number furnished was not sufficient, is held in Rosin v. Danaher Lumber Co. 63 Wash. 430, 115 Pac. 833, which is accompanied in 40 L.R.A.(N.S.) 913, by the recent cases, on the duty of a master to provide sufficient help, the earlier decisions having been gathered in a note in 17 L.R.A.(N.S.) 773.

Master — inspection of junk — negligence. A master is held in the Alabama case of Drew v. Western Steel Car & Foundry Co. 56 So. 995, annotated in 40 L.R.A.(N.S.) 890, not liable for negligence in failing to inspect an ammonia tank sold to him as junk, before turning it over to employees to be broken into scrap, so as to be liable for injuries caused by the escape of gas which had been permitted to remain in the tank when the employees started to work upon it.

The duty of the master in respect to servants employed in handling junk seems to have been considered in but one earlier case.

Master and servant — foreman's assignment of insufficient help — liability of master. A shipowner who furnishes sufficient men safely to load the vessel is held in Dair v. New York & P. R. S. S. Co. 204 N. Y. 341, 97 N. E. 711, not liable for injury to a laborer working in the hold, because the foreman delegates too few hands to such place to handle the material sent down, or permits too much to go down at once to be safely handled by the men at work, since the foreman is, with respect to such details of the work, a fellow servant of the injured employee.

The liability of a master for the failure of a foreman to designate enough hands to perform work is discussed in the note accompanying the foregoing case in 40 L.R.A.(N.S.) 918.

Mayhem — disfigurement — acid as instrument. That carbolic acid is an "instrument" within the meaning of a statute providing for the punishment of disfiguring another by means of a knife or other instrument, is held in Lee v. State, — Tex. Crim. Rep. —, 148 S. W. 567.

The authorities upon mayhem as depending upon the means or instrument used to inflict the injury are gathered in the note appended to this case in 40 L.R.A.(N.S.) 1132.

Mine — adverse possession — dispensing with proof — statute. Under the provisions of § 2332 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1433), the claimant to mineral lands in the United States, who has been in the open, exclusive, adverse possession of a claim for a continuous period equal to that required by the local statute of

limitations governing adverse possession of real estate, is held in Humphreys v. Idaho Gold Mines Development Co. 21 Idaho, 126, 120 Pac. 823, annotated in 40 L.R.A.(N.S.) 817, to be relieved of the necessity of making proof of posting and recording a notice of location and such other proofs as are usually furnished by the county recorder; or, in other words, he is relieved of furnishing the evidence of record title.

But he must show compliance with the statute in the matter of discovery and the performance of the annual assessment work, and, before he can acquire a patent therefor, must also show that he has done the required amount of work on such claim to entitle him to a patent therefor.

Mine — lease — right to use spaces to move coal. A grantee of coal in place, with license irrevocable to mine and remove it, is held in Schobert v. Pittsburg Coal & Min. Co. 254 Ill. 474, 98 N. E. 945, annotated in 40 L.R.A.(N.S.) 826, to have, until the coal is all removed from the land granted, the right to use the space created by the removal of coal to move coal mined on his adjoining land, across the land of the grantor, to a shaft where it is brought to the surface.

Mortgagor — void foreclosure — right of purchaser. That one who takes possession of real estate under mesne conveyances from a purchaser at a void foreclosure sale of a valid mortgage is entitled to all of the rights of a mortgagee in possession, is held in the Nebraska case of Kaylor v. Kelsey, 136 N. W. 54, which is accompanied in 40 L.R.A.(N.S.) 839, by a note in which the decisions treating of the right of one in possession claiming under a void foreclosure sale are collected and discussed.

Parent and child — transfer of custody — welfare of child. Where a mother dies immediately after the birth of a child, and the father commits it to the custody of a competent woman, who properly cares for it in a suitable home, without compensation, and the father permits a mutual attachment to grow up between them for a number of years under a contract with him awarding to her its permanent custody, it was held in the Nebraska case of Burdick v. Kaelin, 136 N. W. 988, 40 L.R.A.(N.S.) 887, in a proceeding by the father to regain his child, that the general rule, that the controlling consideration is the child's own best interests, applies.

Principal and agent — exclusive sales agency — sale to resident — liability for commissions. A manufacturer is held in the California case of Haynes Automobile Co. v. Woodill Auto Co. 124 Pac. 717, annotated in 40 L.R.A.(N.S.) 971, not liable to an exclusive sales agent for commissions upon sales made by him, merely because the purchaser is a resident of the territory covered by such agency, if the sale was made outside such territory.

Railroads — failure to give signal — liability to section men. That section men are not entitled to the benefit of a statute requiring crossing signals to be given by railroad companies, although the statute provides that failure to give the signal shall render the company liable for all damages which shall be sustained by any person by reason of such negligence, is held in Lepard v. Michigan C. R. Co. 166 Mich. 373, 130 N. W. 668, annotated in 40 L.R.A.(N.S.) 1105.

Surety — judgment against principal — binding effect. That a judgment against a man in a bankruptcy proceeding to which his wife is not a party is not admissible in evidence in a proceeding by the judgment creditor to enforce a mortgage which she had given as surety for him, where the judgment against him was not a prerequisite to her liability and her contract does not bind her to abide a judgment against him, is held in the case of Ballantine v. Fenn, 84 Vt. 117, 78 Atl. 713, which is accompanied in 40 L.R.A.(N.S.) 698, by a note on the effect upon a surety of judgment against the principal.

Tax — back taxes — assessment against personal representative. Under statutes authorizing the assessment of property

which was omitted from assessment by mistake or inadvertence, making personal representatives personally liable for taxes assessed against them, and giving them a remedy over against the beneficial owner, it is held in the Wisconsin case of Bogue v. Laughlin, 136 N. W. 606, that taxes which should have been assessed during the lifetime of a taxpayer and may be assessed against his personal representatives, if there is personal property in his possession belonging to the taxpayer which is subject to taxation, even though it is not the identical property which had been omitted.

The decisions on the subject of assessment after death of owner, of taxes omitted during his lifetime, are gathered in the note accompanying the foregoing case in 40 L.R.A.(N.S.) 927.

Tax — change of domicil — intention — necessity of acquisition. One is held in the Iowa case of Barhydt v. Cross, 136 N. W. 525, not to lose his domicil so as to be exempt from taxation there, by starting on an extended journey with the intention of establishing the domicil elsewhere, until he has actually established such domicil.

Whether a domicil is lost by abandonment without intention of returning, before acquiring a new one, is considered in a note accompanying the foregoing decision in 40 L.R.A.(N.S.) 986.

Vendor and purchaser — rescission — undiscovered fraud — acceptance of promise to pay vendor's lien. One who, upon contracting to purchase real estate and assume payment of the vendor's liens thereon as part of the consideration, is misled by a false statement that a particular lien note has been paid, is held in the Texas case of Hill v. Hoeldtke, 142 S. W. 871, not entitled to avoid liability on his undertaking to pay such liens, because of the misrepresentation, if, before he discovers it, the note has been canceled.

This case is also authority for the proposition that acceptance by one holding a vendor's lien on real estate, of the promise of a second vendee to satisfy the lien as part of the consideration which he is to pay the original vendee for the property, deprives the parties to the second sale contract of the power to rescind it so as to relieve the second vendee of his liability, without the assent of the original vendor, although such vendee had no notice of the acceptance.

The decisions treating of rescission of the purchase of real estate as affecting the assumption of a mortgage or lien thereon are gathered in the note appended to the foregoing case in 40 L.R.A. (N.S.) 672.

Writ — service on partner — supposed corporation. Where a summons wherein a defendant company was erroneously named as a corporation, when in fact it was a copartnership, was personally served within the state on a partner as the managing agent of the alleged corporation, it is held in the North Dakota case of Goldstein v. Peter Fox Sons Co. 135 N. W. 180, to constitute a valid service upon the partner and copartnership, sufficient to vest jurisdiction in the court to permit, on proper showing made, an amendment of the summons and complaint served, that the defendant company may be designated therein as a partnership with partners named.

The neglect of erroneously describing defendant in process as a corporation, instead of an individual or partnership, or *vice versa*, is considered in the note accompanying the foregoing decision in 40 L.R.A.(N.S.) 566.

Recent English and Canadian Decisions

Damages — breach of warranty of machinery — purchase of new machinery in mitigation of damages — profit accruing therefrom. A question of unusual character was decided in British Westinghouse Electric & Mfg. Co. v. Underground Electric R. Co. [1912] 3 K. B. 128, reversed in 81 L. J. K. B. N. S. 1132, 107 L. T. N. S. 325, the facts of which are as follows: A manufacturer, having contracted to supply certain steam turbines to a railway company, delivered machines which failed to satisfy the conditions of the contract as to

economy of working. The railway company accepted the machines, reversing their right to damages for the breach of the contract; and subsequently, the manufacturer's efforts to bring the turbines up to contract specifications having been unavailing, replaced them with those of another manufacturer, which were so much more efficient that, even had the turbines supplied by the first manufacturer been up to contract requirements, the economy effected by the substitution of the turbines of the second manufacturer, during a period of years representing the normal life of those originally supplied, would have more than paid for the substitution. The court of appeal held that, notwithstanding the advantage accruing to the purchaser, he was nevertheless entitled to recover the whole cost of the purchase and installation of the new turbines. This decision was reversed by the House of Lords, which held the purchase of the new turbines was not *res inter alios acta,* but a transaction in which the persons whose contract was broken took a reasonable and prudent course naturally arising out of the circumstances in which they were placed by the breach; and therefore that it was proper, in assessing damages, to take into consideration the advantages accruing from the purchase. The Lord Chancellor said that in assessing damages for breach of contract the fundamental basis is compensation for the pecuniary loss naturally flowing from the breach; but that this principle is qualified by another which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps; that this second principle does not impose on the plaintiff an obligation to take any steps which a reasonable and prudent man would not ordinarily take in the course of his business; but that when, in the course of his business, he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

Detinue — trover — demand and refusal before writ. The plaintiff's watch, which had been bought some years previously at the defendant's shop, was stolen from the plaintiff, who gave information of the theft to the defendant. The watch, having subsequently come into the hands of an innocent purchaser, was sent by him to the defendant for an opinion as to whether it was an antique watch. The defendant wrote to the latter party, acquainting him with the fact that the watch had been stolen, and asking him how much he would take for the watch; and to the plaintiff informing him that the watch had been sent to him for inspection, suggesting that it might be repurchased for the price it cost the third person, and asking his wishes in the matter. No answer was made to this letter, but a few days afterward a clerk of the plaintiff's solicitors called at the defendant's shop and, without showing evidence of his authority, demanded the watch, and on this request being refused, at once served the defendant with a writ of detinue, which he had taken out on behalf of the plaintiff about two hours previously. Upon this state of fact it was held, though by a divided court, that there had been no wrongful refusal on the part of the defendant to return the watch to the plaintiff before the date of the issue of the writ, and that the defendant's subsequent conduct in declining to return the watch, and in defending the action, could not be regarded as relating back and as showing the motives actuating him before the date of the issue of the writ; and therefore that the plaintiff had no cause of action against the defendant, either in detinue or trover. Clayton v. LeRoy [1911] 2 K. B. 1031, 81 L. J. K. B. N. S. 49, 105 L. T. N. S. 430, 75 J. P. 521, 27 Times L. R. 479.

Municipal corporations — taxation — exemption granted to manufacturer. An agreement by a municipal corporation to grant to a proposed manufacturing company "a total exemption from taxation" for a specified period of time "on its buildings, plant, stock, and on the land on which its buildings established for manufacturing purposes are situated, "does not exempt the company from lia-

bility to contribute to the cost of sewers constructed on streets abutting upon its property; nor is such exemption enlarged by a proviso that it "shall not apply to the ordinary water rate for fire protection, nor to the rate for water used by the company." Halifax v. Nova Scotia Car Works, 45 N. S. 552.

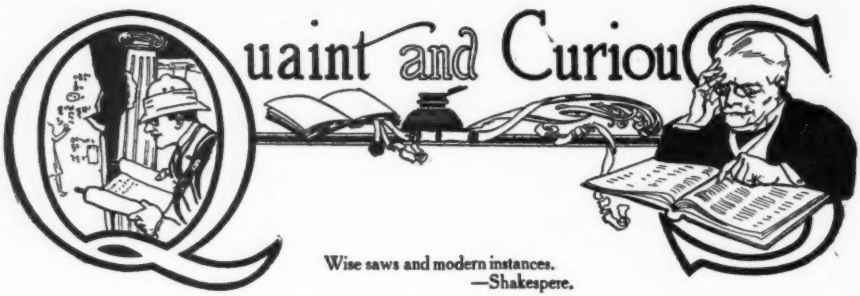
Principal and agent — liability of principal for fraud of agent. That a principal may be held liable for the fraudulent conduct of his agent even though he did not receive any benefit therefrom, is held by the House of Lords in Lloyd v. Grace, S. & Co. 81 L. J. K. B. N. S. 1140, in which the English decisions bearing upon the question are exhaustively examined.

Shipping — collision — damage — tug and tow. An important question of maritime law decided by the House of Lords in The Devonshire, 81 L. J. Prob. N. S. 94, 107 L. T. N. S. 179, is that where no relation of master and servant is established between the owners of a tow and those of a tug, the tow is to be regarded as an innocent ship and therefore entitled to recover the full damages occasioned by a collision with a third vessel due to the combined fault of the tug and the third vessel; and, furthermore, that the admiralty rule as to division of loss does not apply, and the whole of the damages may be recovered from the third vessel.

Shipping — deviation occasioned by unseaworthiness — effect on contract of cargo. A question of considerable importance to those interested in the carriage of goods by sea has recently been passed upon by the House of Lords in Kish v. Taylor, 81 L. J. K. B. N. S. 1027, in which it was held that a deviation reasonably necessary for the safety of the ship and cargo, did not put an end to the contract of affreightment so as to deprive the owners of the vessel of the benefit of special stipulations therein, even though the deviation was due to the fault of the owners or master in overloading the vessel with deck cargo to such an extent as to make her unseaworthy. This is a reversal of the decision of the court of appeal, which had theretofore held that deviation from such a cause is unjustifiable, and therefore displaces the special contract of affreightment. The decision of the House of Lords, however, recognizes the right of the owner of the cargo to maintain his action for any damages arising from a deviation so occasioned.

Wills — construction — remainder to class — gift over to "survivors." One of the vexing questions incident to testamentary construction is the determination of the period to which survivorship relates where there is a gift to the survivors of a class, the enjoyment of which is postponed to a precedent estate. The English court of appeal has recently held, in a case where testator gave his residuary estate to his wife for life and then to be divided equally between his children, further directing that in case of the death of one or more of the children, their equal share or shares would be equally divided between the survivors, that the survivorship must be referred to the period of division, so that a child who predeceased the life tenant took nothing under the gift. Re Poultney, 81 L. J. Ch. N. S. 748.

Wills — construction — gift to children of any property not disposed of by wife — power of wife to dispose thereof by will. A will by which testator gave all his property absolutely to his wife, with a direction that their children should be suitably maintained and educated by her, further providing "that should my said wife die leaving any of my said property or rights in her possession or not disposed of, that upon her said decease the same should be divided among our said children," was held in Shearer v. Hogg, 46 Can. S. C. 492, not to empower the wife to dispose of the residue at the time of her death, by will, notwithstanding the use of the phrase "in her possession or not disposed of," the will as a whole evincing testator's intention that his property should be used solely for the benefit of his family.



Wise saws and modern instances.
—Shakespere.

River as Law Court. To act in a legal capacity while enjoying a morning swim —surely a unique record in the annals of law—once fell to the lot of Vice Chancellor Shadwell. The then Duke of Newcastle had commenced to cut down the timber at Clumber in such a rapid and wholesale manner as to raise the anger of his eldest son, Lord Lincoln, who, finding expostulation useless, turned to the law and sought an injunction to restrain his father. Although it was "long vacation," he ordered his solicitor to press matters forward, for the magnificent trees were falling at an alarming rate.

So up to town posted the attorney, and had the affidavits drawn up the same night. The following morning he repaired to the vice chancellor's house, on the banks of the Thames, to find on his arrival that his lordship had gone for his morning's swim. With exemplary presence of mind he chartered a boat, and, after a stiff pull, came up with the Judge, and at once stated his case. Meanwhile the vice chancellor trod water, and, on the injunction being formally applied for, granted it forthwith and resumed his swim.—Tit-Bits.

Saved by a Song. Two Germans were walking one cold day on the banks of a large pond, when one of them fell in. He could not swim and screamed for aid. The other, who was an officer, did not feel inclined to take so cold a plunge, and calmly watched the struggles of the sinking man. All at once the man in the water began to sing a verse of the "Marseillaise," and the officer jumped in forthwith, for his strict orders were to arrest any person whom he heard sing that famous song. The unfortunate citizen was imprisoned for eight months, but that was better than drowning.—Argonaut.

A Unique Pleading. Negroes are a race unto themselves, and some of their ideas are past the range of a white man's mind to understand.

In a Mississippi town, a rather amusing incident happened a few days ago.

A young attorney of that city, who is considered well posted on the laws of domestic relations and who enjoys a rather large divorce practice, was sitting in his office, ruminating on the best possible manner to make five dollars do the work of ten, when his door was opened and there entered a negro woman for whom some months previous he had obtained a divorce from her liege lord.

The attorney scented a fee and was all attention. "Come in, Molly," he called; "what can I do for you now?"

"Gawd bless you, Mister Jim, I'se in sho nuff trouble dis time." "What's the row, Molly, do you want another divorce?" "No, Suh; tain't dat, I wishes it wuz; you see its like dis; sence I got rid of dat udder husband, I'se been flying round here putty peart wid de Jakes and de res of deze here nigger sussieties. Well I'se had right sharp bo's, and seberal niggers is axed me bout marryin me, and deys one uv em, I'se kinder sort er promised to. Well, here a while back, dat ole nigger kunjer doctor, Lija, he come a projeckin around my place.

"Well, he kep a camin, and he bring me out candy and a yaller handkerchief; well, tother night he say, 'Molly, I wants to marry you,' and I say, 'Go on Lija,

quit yore foolishness,' and he say, 'Tain'yt no foolishness.' Well, I tell him I don't want to marry, and den he up and low, ef I didn't he'd have me kunjured. Den, I say, 'Alright, I'll see about it.'

"Mr. Jim, you know dat fool nigger done gone to de cote house and bought a pair of license, and now he say dat if I don't marry him, I can't marry nobody else, seeing as dey done gib him de right to me at de cote house, and I come up here to see ef you could'nt hab dat license business fumigated outen de way."

The lawyer explained to the woman that she was wasting time and borrowing trouble; that the fact the man possessed a wedding license amounted to nothing, and she was free to marry whoever she willed, but she would have none of it.

"Now, look here Mister Jim, I wants you to fix up a writin, and I done brought de money to pay you, and I wants you to go ober dere and tell dat clerk what about it."

The lawyer finally agreed, and throwing himself on his trusty typewriter evolved a paper he thought would cover the case.

With his negro in tow he entered the clerk's office, and calling that gentleman into a side room, in the presence of his client, he addressed the startled official something as follows:

To the Circuit Clerk:—

Whereas you did on or about the 5th day of January issue a marriage license to one Lija, a pop-eyed old blatherskite, aged seventy years, authorizing him to wed this woman, Molly Jones, aged twenty-five; and whereas the will of the said Molly Jones, plaintiff in this cause, is to the contrary: Now be it known that Molly Jones, in her own proper person, renounces such a proceeding, demands that you enter an order on your book declaring said license null and void *ab initio;* and resting upon the right conferred upon her by the Magna Charta, the Bill of Rights, and the Constitution of the United States *et cetera,* Mollie Jones now avers that she will in her own good time, without regard to said license, marry whom she pleases, when she pleases, and in such manner as to her best seems fitting.

The clerk let the lawyer get it out of his system, and then wanted to know what it was all about. He saw the point, and assured the woman that he would fix it all right so that she could please herself about marrying, and well pleased she went home, vowing that Mr. Jim is the best lawyer on earth.

An Obdurate Creditor. In the January number of CASE AND COMMENT there is an article entitled "False Teeth," which might be supplemented by an amusing story of Slim Jim, who is perhaps the most celebrated cab driver in the country. He is 7 feet high and wears a plug hat. On misty days he has frequently been mistaken for a lamp-post by various species of near-sighted beings.

Jim is the author of the famous declaration that all the money he has made playing poker he has lost driving a cab. His long suit is borrowing money to play poker. His ability, however, to borrow from any except strangers, ceased long ago. Once Jim became possessed of a presentiment that it was his lucky day, and he started out to raise $20. His cab and horses had so often been put up as security, and then recovered without liquidating (either by stealth; by representation of the necessity therefor in order to earn the money to pay the debt, or through voluntary release by a distressed creditor paying feed bills), that Jim knew the futility of securing anything on them. His only other valuable possession was a set of false teeth with a gold plate, and he finally secured $20 by depositing the teeth as security.

Jim's presentiment proved to be without foundation, and he was soon back after his teeth. He pleaded and promised, but all in vain. The next morning he tried to borrow the teeth long enough to get something to eat, and was firmly refused. "But I am hungry," howled Jim, "I'm starving." "Then go eat soup," was the comforting retort. Soup it was for nearly a week, and this debt is the only one on record Jim ever paid.

How Witches were Tried. When the witchcraft delusion of 1692 seized the province, the people would not wait for the workings of the established tribunal

of justice. It was too slow to suit them. No doubt they feared that it would be "reactionary" or inclined to be too respectful to the letter of the law. So they cried out for a special court to hustle along the trial of the witches, and Governor Phipps meekly yielded to the clamor and named seven judges to conduct the trials.

It was distinctly a popular court, and was controlled absolutely by the popular will. Not a single one of the seven judges was a lawyer. Two of the judges were clergymen, two were physicians, and three were merchants. The common law was thrown aside, rules of evidence were ignored and the judges and juries were left untrammeled by any "quibbles of the law" to follow their own feelings and the popular will.

Says Washburn in his "Judicial History of Massachusetts:" "The trials were but a form of executing popular vengeance. Juries were intimidated by the frowns and persuasions of the court, and by the outbreakings of the multitude that crowded the place of trial, to render verdicts against their own consciences and judgment." He cites one case, that of Rebecca Nurse, in which the jury actually had the courage to bring in a verdict of not guilty. Whereupon "the accusers raised a great outcry and the judges were overcome by the clamor." The jury was sent back, returned with a verdict of guilty, and the woman was accordingly executed. Thus promptly and effectively did the popular will succeed in bringing about the judicial decision it wanted.—Boston Herald.

The Burglar and the Hypnotic Eye. A Philadelphia lawyer, states the Cleveland Plain Dealer, has a fad. It isn't a new fad. Other men have had it, and worked it hard and forgotten it. It is called hypnotism.

A night or two ago the lawyer heard a noise. In fact it awoke him from a sound slumber. He listened intently. The noise was repeated.

The lawyer arose and went down stairs. Clad in the habiliments of the bed chamber and armed only with his fad, he went down stairs to meet the danger, whatever it proved to be.

In the meantime, the lawyer's wife had awakened his four daughters, and the five women, with blanched faces, listened on the stairway. The moments passed—a number of them—and the five women finally ventured down. Then they saw the husband father facing a rigid burglar whose hands were up, holding him helpless with a hypnotic gaze. Yes, and he held him there for twenty minutes, held him until the suburban police arrived.

Of course that was gratifying to all concerned, with the exception of the burglar. It proved the power of the human eye and the value of the fad. But, of course, it can't be taken as an infallible recipe. The next burglar the Philadelphia lawyer goes up against may be a cross-eyed man without any power of concentration whatever. This would insure unpleasant results.

We believe in catching burglars by any means that can be devised, but we have an impression that in cases of this sort it is always well to back a hypnotic eye with a fat revolver and a baggy bludgeon.

Damages. Joseph Choate, apropos of a suit for rather exorbitant damages, said at a dinner in New York:

"We are very prone to reckon up our damages like Brownlow, who was claiming burglary insurance on a stolen umbrella.

" 'Now, let me see,' said Brownlow to himself, 'the umbrella cost originally $8. It was re-covered twice at $3 a time—that makes $14. I got a new stick put in it in 1904—$2.50—that makes $16.50. And three new ribs—$1.25—or $17.75 in all. I'll put in a claim for $17.75 immediately.' "

The Court Admitted It. A well-known local attorney, says the Cleveland Plain Dealer, told a story the other day that showed the equable character of the temper of the court a generation ago.

The late Stevenson Burke, while arguing a case before the late Judge Horace Foote, was greatly annoyed during his summing up by the fact that the judge persisted in scribbling on a bit of paper. Twice Attorney Burke stopped and asked for the court's attention. Both

times the judge, without looking up or checking the scribbling, assured him he was being heard.

The third time the lawyer checked his argument, he told the judge in a caustic manner that he certainly did not seem to be giving him his attention.

The judge snapped back, "I am listening to the counsel; what I seem to be doing has no bearing on the matter."

Attorney Burke's client lost the case and Burke promptly asked for a new trial, alleging, among other reasons, misconduct on the part of the court.

He argued this point before Judge Foote, and the latter listened closely and gravely. When Burke finished his remarks the judge spoke:

"I am convinced," he impassively observed, "that the counsel's claim that the court was guilty of misconduct is well founded. A new trial is granted for this cause."

Even With the World. "A client of mine who, though in possession of valuable properties, was sadly embarrassed for lack of ready cash and somewhat pressed by his creditors, came to my office for consultation the other day," said a lawyer. "He wanted me to advise him as to the best course to pursue, and the first thing I did was to haul out my pencil and start in to figuring. After naming several large items he brightened up and said: 'Suppose we suspend these calculations. After all, I am not in such a bad shape. As a matter of fact, I believe I am square with the world.'

" 'How do you make that out?' I inquired in some surprise.

" 'Well, it's this way,' he answered. 'In thinking the thing over I have reached the conclusion that there are just as many people that I don't owe as that I do, and it seems that this ought to make the balance about right.' "—Baltimore American.

No Legal Advice. "I see that you are a real-estate man," said the caller as he entered the office of a dealer, "but you are probably posted in the law enough to answer a question. If so, I am willing to pay for it."

"I give no legal opinions, sir!" was the reply.

"But this is a very simple matter."

"But you must go to a lawyer."

"But there isn't one within a mile of here."

"I can't help that."

"The question simply is—"

"Sir, I positively refuse."

"Oh, well, if you are so stiff as all this I'll have to go elsewhere, but I must confess to being a little surprised."

"You are not so surprised as I was about ten years ago," said the dealer. "A man who suspected that a neighbor was stealing his stove wood came to me and asked if he hadn't a legal right to load a stick or two with gunpowder. I told him that he had."

"And he went ahead on your opinion?"

"He did, and a week later I also went ahead. The wife of the suspected wood stealer was a washerwoman who went out by the day. One evening my wife asked me to drop in there and engage her for the next day."

"Um."

"I was in there when one of the loaded sticks exploded and blew up the stove, the kitchen, the woman, and myself, and the doctors didn't get through tinkering at me for about three months. No, sir, you will get no legal opinion from me. Go to a regular lawyer, and let him be blown through the window into the yard and lose his hair and eyebrows and have his legs roasted."

Too Much for Flanagan. It was Lawyer Steve O'Brien that had the case, says the New York correspondent of the Cincinnati Times Star. The uncle of Patrick Flanagan of Carrick-on-Shannon had died and left to Patrick $20,000 in hard money. Mr. O'Brien trailed Mr. Flanagan anxiously about town. He heard of him here and he heard of him there, but he finally located him in the depths of a sewer that was being dug on Third Avenue. "Pathrick Flanagan?" called Mr. O'Brien.

Mr. Flanagan answered.

"Are you the son of Pathrick Flanagan and was your mother's name Mary? And what were the names of your uncles?"

Mr. Flanagan answered correctly.

"Then come up," said Mr. O'Brien.

"Your Uncle James has just died and left you $20,000."

There was a commotion in the ditch, and Mr. O'Brien leaned over again and called anxiously, "Pathrick Flanagan."

"I'm coming sor," said Flanagan. "I just stopped to lick the boss."

Mr. Flanagan proved his right to the money, paid Mr. O'Brien what was due him, and for a few weeks infested Third avenue, dressed in a high hat and hard shoes, and doing full justice to his thirst. He just burned up that ardent thoroughfare until his money gave out and he disappeared from sight. The other day his other uncle died, and Mr. O'Brien went back to the works. "Pathrick," said he, "your Uncle Tom has died and left you $20,000 more. Come down to the office and get it to-morrow."

Mr. Flanagan stuck his pick into the side. "I don't believe I can do it, Mr. O'Brien," said he. "Im not a sthrong man like I was whin I got that other money. I doubt I'd live troo spending twinty t'ousand dollars more."

Lawyer's Phoney Fee. A noted lawyer of one of the Southern states, famous not only for his brilliant mind and legal ability, but also for his rigid code of honesty, used to tell this story on himself:

Soon after the Civil War the judge was called on to defend a man accused of passing counterfeit money. The old lawyer, after investigating the matter and satisfying himself that the man was innocent of any intent to do wrong, and had only paid out money which he had received in good faith, undertook the case. When the case came up for trial the jury was so impressed by Judge ———'s plea for his client, and his explanation of the circumstances, that a verdict of not guilty was rendered without delay.

The acquitted man was very grateful to Judge ———, and, after thanking him profusely for getting him out of the ugly scrape, said:

"Judge, I'll never forget what you've done for me, and some day I hope to be able to prove my gratitude; but the only thing I can do now is to pay your fee, and I'll pay whatever you ask. How much is it?"

"Well, I think about $1,000 will be fair," replied the judge.

"That's fair enough, sir," agreed the client, "but, judge, the only money I've got is the same kind of money that I have just been prosecuted for spending. Some of that money is good and some of it is the counterfeit that was worked off on me, and I don't know t'other from which. Now, I will pay you $1,500 in the bills that I have got, and you do the best you can with it."

As there seemed nothing else to do, the judge agreed to this, and the client paid him the $1,500 in bills and left him.

The judge took the $1,500 to his bank, and explained the circumstances to the cashier, and asked him to take out the bills which he, as an expert, pronounced good. The cashier did so, and the judge deposited the accepted bills to his credit, and then taking the package of doubtful money to another bank he made the same explanation and request of the cashier, the bank receiving on deposit the money which, as experts, they pronounced good.

"And do you know," said the judge, "after I had visited six banks I had got rid of all the money except five $20 bills, which all the banks had agreed were counterfeit, and my fee in the case, instead of being the $1,000 which I originally charged the man, netted me $1,400, and I've always had a suspicion that if there had been a few more experts in the town I would have got rid of those last five $20 bills."

"What became of the five bad twenties?" someone asked the judge.

"I'm not sure," replied the old lawyer. "My wife asked me for them and shortly afterward she made a trip to Washington. When she returned she showed me a brand new $100 bill, which she said she had got at the United States Treasury; but I never asked her any questions. I knew the Treasury Department had experts, too."

An Alluring Letter Head.

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Changes Name to Cheat Punsters. The friends of Charles Arestad, of 179 Sixth avenue, says the New York American, may henceforth ask him if he can sing, or if he feels like a bird, or if he has left his feathers at home. But it will not be appropriate for them to say, as in the past:

"Hello, Charlie. So you're arrested, are you? I suppose your father was arrested also; in fact, I suppose your whole family was arrested. Have you been indicted yet? Guilty or not guilty? When does your case come to trial?"

Arestad obtained permission from Supreme Court Justice Pendleton yesterday to change his name to Charles Nightengale. He said he could not remember having been introduced to anyone who did not emit some kind of a foolish pun about Mr. Arestad being arrested. The annoyance had been so great that he had not gone to any social gathering for a long time, he said.

Law Didn't Get Her Goat. Magistrate Naumer, sitting in Coney Island police court, "got the goat" of about twenty goat owners when he had them arraigned before him, charging them with harboring goats without a goat license. Coney Island property owners accused the goats of eating everything from railroad iron to the week's wash.

When Mrs. Josephine Respio was arraigned she began:

"Your Honor, I had a goat, a little kid billygoat. The policeman told me I had to have a license to keep my goat, but I told him I guessed that was too much red tape. So I killed the goat and ett him. I didn't need a license for that. I don't think I belong here, do I?"

The magistrate said he didn't think she did.

Acute Sense of Hearing. "Yes," said the prosperous lawyer in speaking to a friend, "I had a long wait before I got any practice, but I am certainly satisfied now with my profession and its emoluments. The early days, the waiting for clients, were hard, though. Why, do you know that I got so after awhile that when I heard a footstep on the stairs I could tell ninety-nine times out of a hundred whether or not the person was coming to my office."

"Well, that is strange," replied his friend. "Your sense of hearing must have been very acute."

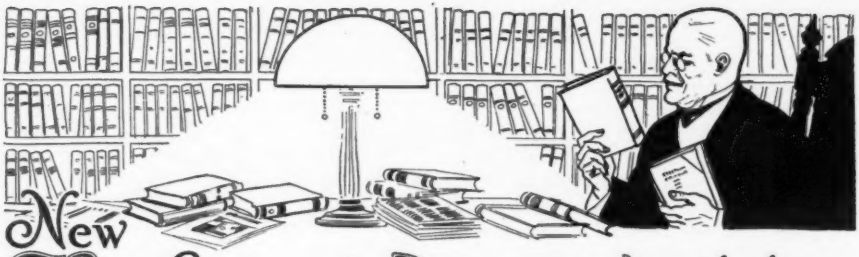
"Not so much that," replied the lawyer. "You see, I made up my mind that they were not coming to my office, and ninety-nine times out of a hundred I was right."

Providing for the Future. It is related of Mr. E. E. Corwin, of the Columbus, Ohio, bar, that when a young man working his way through college, he secured employment during a summer vacation at "carrying the umbrella," *i. e.*, a hod of brick or mortar, up ladders to where bricklayers were at work. He had been persevering at this task for a week or so, to the amazement of an old colored hod carrier, who had been expecting him to quit every day, owing to the strenuous nature of the occupation. Finally the old man asked: "Mr. Corwin, what am you going to make of yourself, you coming out of college and carrying the hod?"

"I expect to study law, after graduating," was the reply, which raised quite a laugh among the bystanders.

"Well, boss, if any of us poor devils ever get into trouble, will you help us out?"

Mr. Corwin laughingly assented. Later, and soon after his admission to the bar, he was called upon to defend and succeeded in securing the acquittal of George Farris, accused of burglary and petit larceny, after he had been convicted of the charge. Farris was the colored man and hod carrier who had tentatively secured his services three or four years before.



New Books and Recent Articles

"Men disparage not antiquity who prudently exalt new inquiries."—Sir Thomas Browne.

"The Law of Quasi Contracts." By Frederick Campbell Woodward. (Little, Brown, & Co., Boston). $3.

The author of this work has undertaken and well performed a valuable service. It is nearly twenty years since Professor Keener's treatise on Quasi Contracts. In that time, there has arisen an urgent need of a book containing a further analysis and classification of quasi contractual obligations, a more thorough treatment of many parts of the subject, and a larger collection of modern authorities. It was with the hope of meeting this need that the present work was written.

The volume contains 500 pages, is well indexed, and abounds in copious citations of authorities.

"Letters to a Young Lawyer." By Arthur M. Harris. (West Publishing Co., St. Paul). $2.

These quaint, breezy letters, ostensibly written by a father to a son, are well worth perusal. They are filled with entertaining incident and a sound philosophy, the fruit of ripe experience. This is one of those rare books that is instructive without being dull, unusual without being tiresome, and which will stand the test of repeated readings.

Few young lawyers have a father who could write them such letters, but they may derive the benefit of them by a process of literary adoption. Their elder brethren at the bar may also find in them hints of material value.

"Engineers' Handbook on Patents." By William Macomber. (Little, Brown, & Co., Boston). $2.50 net.

This is a handbook addressed to engineers, but of value to inventors and manufacturers also. Our great inventions are now being thought out by trained scientists, who have learned that success is only to be attained by sustained systematic effort. To these men, as well as to those interested in the elements of patent law, this plainly written little volume will appeal.

The author is a lecturer on the law of patents in the Cornell University, College of Law, and has written on "The Fixed Law of Patents." He is well qualified to discuss the important questions with which he deals, and has done so clearly and concisely.

"Digest of Decisions of Federal Courts and Interstate Commerce Commission on Transit Privileges." By Charles S. Belsterling. $5.

The announced purpose of this digest is to collect and bring up to date all of the decisions of the Federal courts and the Interstate Commerce Commission as they deal with transit privileges.

In an admirable foreword the author defines a transit privilege as one allowing the owner of freight to stop the car *en route*, unload the contents for the purpose of manufacturing, cleaning, grading, or doing other legitimate work thereon, and then reload and reforward to final destination. One through rate of freight is paid from the primary point of production to the final destination, plus a reasonable charge for the stopover privilege.

The test of the allowance of this privilege is said to be, Is it necessary for the life of that particular trade, and not, Is it convenient? The author states that as the abrogation of the transit privilege, wherever it now exists, would be an unjustifiable confiscation of property values, so an extension of the privilege on other commodities would likewise confiscate the revenues of the great transportation interest.

The safeguarding of the transit privileges so as to prevent discrimination is one of the most perplexing matters the Commission has had to meet.

The decisions are set out in propositions of moderate length and well classified. There is a table of cases cited, and the act to regulate commerce (including interpretations thereon pertaining to transit privileges) is appended.

"Accord and Satisfaction, Compromise, and Composition at Common Law." By Alva R. Hunt. 1 vol. $6.

"Hornbook Case Series." To accompany various volumes of the Hornbook Series.

Cooley's "Cases on Insurance." To accompany Vance on Insurance. $2.50

Cooley's "Cases on Damages." To accompany Hale on Damages. $2.50.

Cooley's "Cases on Persons and Domestic Relations." To accompany Tiffany on Persons and Domestic Relations. $2.50.

Throckmorton's "Cases on Evidence." To accompany McKelvey on Evidence. $2.50.

Throckmorton's "Cases on Contracts." To accompany Clark on Contracts. $2.50.

Throckmorton's "Cases on Equity." To accompany Eaton on Equity. $2.50.

Gilmore's "Cases on Partnership." To accompany Gilmore on Partnership. $2.50.

"Law of Persons or Domestic Relations." By Epaphroditus Peck. 1 vol. $4.

"Equity Pleading and Practice." By George Frederick Rush. 2d ed. 1 vol. $3.

"New Federal Equity Rules." With Annotations and Forms. By James L. Hopkins. Buckram, $2.50. Flexible morocco, gilt edges, $3.

"Law of Commercial Exchanges." By Chester Arthur Legg. 1 vol. Flexible leather, $3.50.

Howell's "Michigan Annotated Statutes." In 6 vols. $36.

Stace's "Michigan Chancery Pleading and Practice." With forms. 1 vol. $7.50.

Hurst's "Annotated Pocket Code of Virginia." 3d ed. Red morocco, flexible covers, $7.

"The Story of a Great Court." By Hon. John B. Winslow. A sketch history of the remarkable men who sat upon the Wisconsin supreme bench during the early years of the state. $3.25.

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Alaska.

"Our Alaska Bargain."—Century Magazine, February 1913, p. 581.

"Alaska as a Territory of the United States."—Century Magazine, February 1913, p. 582.

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"Glimpses of Famous Trial Lawyers."—19 Case and Comment, 608.

"Watchman, What of the Night?" (Corporation and anticorporation attorneys).—19 Case and Comment, 614.

"The Lawyer as a Citizen."—76 Central Law Journal, 58.

Work of the Committee on Professional Ethics of the New York County Lawyers' Association."—45 Chicago Legal News, 188.

"Contingent Fees in Personal Injury Cases."—1 Southern Bench and Bar Review, 10.

"Effect of Pardon on Disbarment of Attorney."—16 Law Notes, 185.

Automobiles.

"The Automobile and Its Mission."—Scribner's Magazine, February, 1913, p. 149.

Banks.

"Bank Deposits and Collections. II."—11 Michigan Law Review, 210.

"The Law of Banking."—30 Banking Law Journal, 49.

"Modern Banking and Trust Company Methods."—30 Banking Law Journal, 56.

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"The Negotiable Instruments Law."—30 Banking Law Journal, 15.

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"Victorious Bulgaria."—The Outlook, February 8, 1913, p. 306.

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"Right to Bear Arms."—16 Law Notes, 207.

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"The State Civil Service Act and the Power of Appointment."—7 Illinois Law Review, 329.

Common Law.

"The Genius of the Common Law—VIII. The Perpetual Quest."—13 Columbia Law Review, 93.

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"The Constitution, the Court, and the People."—22 Yale Law Journal, 181.

"Some Powers and Problems of the Federal Administrative."—61 University of Pennsylvania Law Review, 135.

"Is 'the Power of Parliament Omnipotent?'"—76 Central Law Journal, 22.

Contracts.

"The Date and Authorship of the Statute of Frauds."—26 Harvard Law Review, 329.

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"Are Innocent Purchasers of Watered Stock Liable for Debts of the Corporation?"—3 Bench and Bar, 109.

"Preferences by Insolvent Corporation to Officers, Directors, or Stockholders."—61 University of Pennsylvania Law Review, 163.

"Kansas and the Big Corporations."—16 Law Notes, 205.

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"The United States Supreme Court."—1 Southern Bench and Bar Review, 37.

"Jurisdiction of Federal Courts."—1 Southern Bench and Bar Review, 21.

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"Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act."—47 American Law Review, 1.

"The Judicial Censorship of Legislation."—47 American Law Review, 90.

"The Administration of Justice in the Modern City."—26 Harvard Law Review, 302.

"The Popular Dissatisfaction with the Administration of Justice in the United States."—45 Chicago Legal News, 207; 25 Green Bag, 65.

"A Permanent Court of International Justice."—22 Yale Law Journal, 203.

"The Boston Newsboys' Trial Board."—19 Case and Comment, 586.

Criminal Law.

See also Public Defender.

"The Dynamiters."—The Fra, February, 1913, p. 132.

"The Criminal Law Amendment Act, 1912."—77 Justice of the Peace, 1.

"Crime and Insanity in the 21st Century."—30 Medico-Legal Journal, 57.

"The Cat as a Deterrent for Crime."—30 Medico-Legal Journal, 62.

Deeds.

"Estates Tail in Missouri."—7 Illinois Law Review, 355.

"The Doctrine of 'Adoption' as a Substitute for the Signing of a Deed."—16 Law Notes, 187.

Degeneracy.

"Causes of Degeneracy."—1 Southern Bench and Bar Review, 51.

Divorce.

"Separation Orders and the Maintenance of Children."—76 Justice of the Peace, 613.

"The Nevada Divorce Law."—1 Southern Bench and Bar Review, 76.

"A Divorce Court in Canada."—49 Canada Law Journal, 1.

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"The New Equity Rules of the United States Courts."—22 Yale Law Journal, 241.

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"Burden of Proof in a Suit for Profits in Infringement of Patent."—76 Central Law Journal, 39.

"Expert Testimony."—47 American Law Review, 35.

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"Allowance to Trustees and Executors in Ontario."—49 Canada Law Journal, 19.

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"Tales out of Court."—The Outlook, January 25, 1913, p. 181.

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"Writ of Habeas Corpus."—1 Southern Bench and Bar Review, 59.

"A Historic Judicial Controversy and Some Reflections Suggested by it. (Writ of habeas corpus from state court to secure release of person arrested on Federal warrant under act of Congress [fugitive slave law] alleged to be unconstitutional)."—11 Michigan Law Review, 179.

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"National Health and Medical Freedom."—Century Magazine, February, 1913, p. 512.

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"Road Building."—The Fra, February, 1913, p. 152.

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"The Conviction of Judge Archbald."—The Outlook, January 25, 1913, p. 145.

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"The Mental Hygiene Movement."—The Outlook, February 8, 1913, p. 311.

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"Justices and the National Insurance Act, 1911."—76 Justice of the Peace, 614; 77 Justice of the Peace, 3.

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"Jurisprudence not an Objective Science."—25 Green Bag, 74.

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"The Jury System under Changing Social Conditions."—47 American Law Review, 67.

"On the Judgment of One's Peers."—25 Green Bag, 55.

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"Larceny of Ferrets."—77 Justice of the Peace, 39.

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"Reformed Legal Procedure, Federal and State."—47 American Law Review, 48.

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"The Law's Delays."—34 Australian Law Times, 45.

"Some Suggestions as to Technicality and Delay in the Law."—1 Georgetown Law Journal, (No. 2), 20.

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"Disparagement of Property. II."—13 Columbia Law Review, 121.

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"The Law of Procedure under the Illinois Workingmen's Compensation Act."—7 Illinois Law Review, 344.

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" 'Municipal Affairs' in the California Constitution."—11 Michigan Law Review, 132.

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"The Final Stages of the Panama Canal."—The Outlook, January 25, 1913, p. 148.

"Sanitation of the Isthmus."—Scribner's Magazine, February, 1913, p. 234.

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"Lectures on Common-Law Pleading."—6 Maine Law Review, 105.

"A Philological Essay on the Meaning of 'ss'."—25 Green Bag, 59.

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"Poor Litigants."—77 Justice of the Peace, 25.

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"The Procedure in Our American Judicial System."—45 Chicago Legal News, 182.

"The New Jersey Practice Act of 1912."—22 Yale Law Journal, 236.

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"The Public Defender."—19 Case and Comment, 582.

Quo Warranto.

"Limited Judgments in Quo Warranto—The Kansas Idea."—76 Central Law Journal, 5.

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"Land Values."—The Fra, February, 1913, p. 137.

Recall.

"The Recall of Judicial Decisions."—1 Georgetown Law Journal, (No. 2) 1.

"The New Despotism (Recall of Judges)."—45 Chicago Legal News, 192.

Special Privilege.

"The Evil of Special Privilege."—22 Yale Law Journal, 220.

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"The California State Tax on Corporate Franchises."—1 California Law Review, 91.

"Is 'Income' Received from a Licensed Business or Profession and Not from Property or Salaries, Taxable?"—18 Virginia Law Register, 721.

"The Nature of Tax Exemptions."—13 Columbia Law Review, 104.

Treason.

"Luther Martin and the Trials of Chase and Burr: Part II. The Impeachment of Burr."—1 Georgetown Law Journal, (No. 2), 13.

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"Directing a Verdict for the Party Having the Burden of Proof."—11 Michigan Law Review, 198.

"Success in Court."—19 Case and Comment, 575.

"The Lawyer in Court."—19 Case and Comment, 612.

"The Trial Lawyer."—19 Case and Comment, 590.

"Arguments from Authority."—19 Case and Comment, 599.

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Usury.

"Can Subsequent Dealings between Parties Render Usurious a Transaction Originally Free from Taint?"—16 Law Notes, 190.

Waters.

"Recent Cases as to Water Rates."—77 Justice of the Peace, 26.

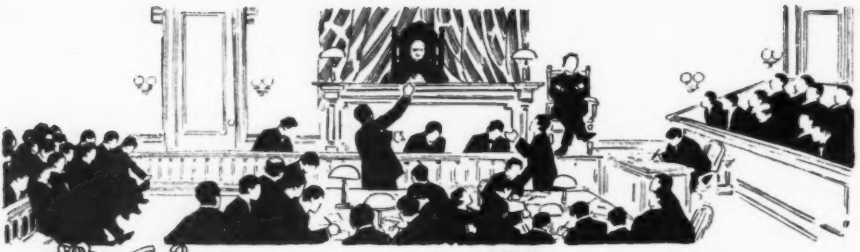
"The Water Bill Proposed by the Conservation Commission of California."—1 California Law Review, 148.

Witnesses.

"The High Art of Cross-Examination."—19 Case and Comment, 594.

As the conservation movement was inaugurated in the first instance very few people could find fault, and very few people did find fault, with the theory or the principles upon which it was organized. The original purpose of the movement was to protect our natural resources from waste and from monopoly, and certainly to that extent no right-thinking person could object to the policy or purpose of the movement. But in the practical application of those principles the people have either been lost sight of or by reason of the difficulty of applying the principles they have been ignored to such an extent that they are not getting the benefit of this conservation movement. Those who desire to see the natural resources of the country protected from the old system which at one time prevailed must necessarily find some practical means to apply these principles, or the conservation policy will break down of its own weight. Unless these natural resources can be made beneficial to the people generally, unless they are going to receive some benefit which is substantial in its import, a policy which is bound to be expensive will in the end fall of its own weight.

As to power sites, I presume we are all agreed as to the great necessity of holding them under public regulation and control. Few men having regard for the public interest would want for a moment to see them turned over without retaining any direction or control for the benefit of the public. In fact, these power sites constitute a public utility and must necessarily be regulated and controlled by the public in the public interest. If there is any instrumentality coming from nature's generous hand which seems peculiarly to belong to the people and peculiarly adapted to be a servant of the people it is hydroelectric power.—*Hon. William E. Borah.*



Judges and Lawyers

Hon. Charles F. Johnson

Sen.or Senator from Maine

THE subject of this sketch was born in Winslow, Maine, February 14, 1859. There he was a playmate and schoolmate of Honorable Leslie C. Cornish, now on the bench of the supreme judicial court, who writes of him as follows: "He was about four years my junior, but we were in the same group. He was a kindly, gentle, and lovable fair-haired boy, a great favorite with everybody—a fine scholar and yet always ready for sports and games. But the life of a country boy fifty years ago was quite different from what it is today.

"His mother died when he was very young, and he, with an older sister, were reared by his father, who was an artisan of the old school, a harness maker who made all his harness by hand and was himself the factory. His shop was a great rendezvous for the boys of that day, and he was a man fond of good reading and with a tentative memory. His work was famous for its worth.

It was amid these simple surroundings that the future Senator was born."

HON. CHARLES F. JOHNSON

He was graduated from Bowdoin College, Brunswick, Maine, in 1879. After his graduation he taught school for about six years, the last five years at Machias, Maine. While teaching he read law from time to time as he was able. In 1886 he came to Waterville, was admitted to the bar and began the practice of law. In September, 1886, he formed a law partnership with Hon. S. S. Brown, of Waterville, the firm being Brown & Johnson. This partnership continued until 1890, when it was dissolved and Mr. Johnson started in practice for him-

self. Very shortly, however, he formed a law partnership with Honorable E. F. Webb and his son, Appleton Webb, both of Waterville, the firm name being Webb, Johnson, & Webb. This partnership continued until the summer of 1894, when Mr. Johnson began to practise alone. In 1910 he formed a partnership with Mr. Carroll N. Perkins, which still continues, the firm name being Johnson & Perkins.

In 1911 he was elected to the United States Senate, where he is rendering excellent service.

Few men have a larger circle of personal friends. When he is home from Washington nine people out of ten will greet him on the street, saying, "Hello, Charlie."

He is prominent in Masonic circles. He was grand master of the Grand Lodge of Masons in Maine in 1906 and 1907, and in 1912 received the thirty-third degree, an honor which he highly appreciated.

In his law practice he has been very successful. In addressing a jury his voice is rarely raised above a conversational tone. He is fair in his treatment of his opponents, and presents his arguments logically and forcefully. As an after-dinner speaker he is in demand. His fund of stories is large, and he enjoys telling them as well as his hearers enjoy hearing them told.

Noted Judge Passes Away.

Few men were better known in Louisiana than Judge Albert Voorhies, who died January 20, in New Orleans. His long career as statesman and citizen won for him the esteem and admiration of the whole community.

He was born in Vermilionville, on January 23, 1829. After completing his education at the Jesuits' College of Grand Coteau, he was sent to Lexington, Kentucky, where he studied law, and returned to his native state at the age of nineteen years to join his father in the practice of law.

His father was then a member of the supreme court of the state, and at his death was succeeded on the bench by his son, who was said to be the youngest judge to sit on that tribunal. When the Confederate War broke out Judge Voorhies was exempted from joining the Confederate Army, but he was made prisoner at St. Martinville when that city was invaded by General Banks's Army. He was later exchanged for one brigadier general and sixty-five privates.

Immediately after the war he was elected lieutenant governor of the state on a mixed ticket headed by Governor J. Madison Wells, a Republican, though the young judge was known to be a stanch Democrat.

Judge Voorhies was elected a member of the legislature during the administration of the late Governor Nicholls and served his term with distinction. He also served as chairman of the state central committee, and was appointed to a judgeship on the civil district court bench to succeed Judge Lazarus. Previous to his election as judge of the supreme court he had served as judge of the district court at St. Martinville, being only twenty-two years of age.

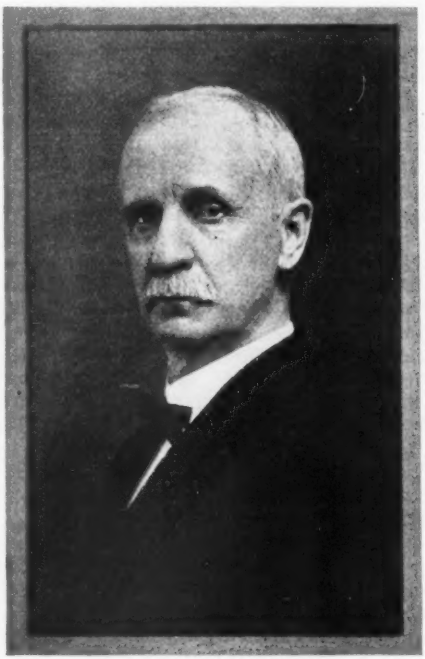
Having retired to private life, Judge Voorhies devoted his later years to his practice, and defended some of the most important cases in the history of the local bar. Among the most important cases which were successfully carried by him to the Supreme Court of the United States was that of Emile Lassere v. The United States. The plaintiff in the case was a rich property owner of the city and most of his property had been confiscated by General Butler. Judge Voorhies, after several years of labor, succeeded in recovering the valuable property, which was located in the heart of the business section of the city. He was the author of a digest of the state's laws.

A strange coincidence was the death of his youngest son, William Voorhies, also a prominent lawyer of the city, who died just sixteen hours previous to his father.

Hon. Henry B. Willis

Judge of the Appellate Court for the Second District

ON the evening of November 5, 1912, while with a great crowd of others in his home city of Elgin, watching the returns of the national election, Judge Willis was struck and run down by a passing locomotive and train, and so seriously injured that the next day he died without having regained consciousness.



HON. HENRY B. WILLIS

Judge Willis was a just man, impatient with all manner of subterfuge and prejudicial technicalities; he aimed steadfastly to promote and expedite the rights of man; he knew neither friend nor foe, rich nor poor; he purposed to do the right thing by all at all times regardless of influence or the lack of it; and while his sympathy for the weak and oppressed made him ever ready to espouse their cause if just, and to give to them his personal aid without compensation, he despised hypocrisy, pretense, sham, and show.

He was born in Bennington, Vermont, on May 8, 1849. In 1852 his parents moved to a farm which they had purchased near Genoa, Kane county, Illinois, where as a lad Judge Willis attended the district school. Later he was sent to the Clark Seminary, at Aurora, and he afterward attended Hillsdale College, in Michigan. He concluded his collegiate studies at the Auburn, New York, Law School, from which he was graduated in 1870. In 1871 he was admitted to practise at the bar of Illinois, and in 1872 opened an office in Elgin, Kane county, Illinois, where he continued the practice of his profession until 1892, at which time he was elected one of the circuit judges of the then judicial district of which this county was a part. Prior thereto, however, in 1880, at the age of twenty-eight years, he was elected state's attorney for the populous county of Kane, and in 1885 he was elected mayor of the city of Elgin.

When serving as state's attorney he vigorously prosecuted the guilty, not, however, forgetful that his duty was as great toward the innocent.

While acting as mayor he is said to have secured municipal ownership of its water system for the city; and his services as mayor made for him a host of personal friends, who will continue to hold him in grateful memory.

In June 1891, he was elected judge of the circuit court, and in 1909 was re-elected for the fourth term, giving him service of twenty years on the bench, during which time he tried many cases of importance. He proved a most capable and satisfactory officer. His mind was analytical, logical, and

inductive. With a thorough and comprehensive knowledge of the fundamental principles of law, he combined a familiarity with statutory law and a sober, clear judgment, which made him not only a formidable adversary in legal combat, but gave him the distinction of being one of the ablest judges of the state.

In politics Judge Willis was a pronounced Republican, who believed firmly in the national Constitution and the established system of government, and viewed with alarm any attacks demanding radical changes therein.

About six years ago the supreme court of Illinois appointed Judge Willis one of the judges of the appellate court for the second district, which position he continued to hold up to the time of his death.

At the commencement of the Civil War, Judge Willis, then but twelve years of age, attempted to join several regiments, but was each time rejected on account of his extreme youth. He was, however, finally accepted and became a member of Company F of the 132d Illinois Infantry, and served with that command until his discharge in December, 1864.

In October, 1874, Judge Willis married Lucy Wait. Of this marriage there were two children, one a daughter, now Mrs. Meribah W. Merrill, of Aurora, Illinois, and the other a son who died in young manhood some years ago in Colorado.

As already intimated, Judge Willis was independent, impartial, honest, courteous, and strong, ever ready to assert and maintain his views. Such characteristics in a jurist are oftentimes likely to prove embarrassing to young lawyers, yet so prone was he to assist the deserving novice that all speak of him in most kindly terms because of his helpfulness to them.

Twenty years' service as circuit judge manifest his hold upon the confidence of the electors, and his appointment by the supreme court to the appellate bench indicates the satisfaction with which the highest court regarded his ability and integrity. It is not too much to say that had he survived he would have himself become a member of that body.

Death of Louisiana Lawyer.

Colonel F. G. Hudson, a member of the well-known law firm of Hudson, Potts, & Bernstein, of Monroe, Louisiana, died January 16, at Hot Springs, Arkansas, where he had gone in search of health.

He was born near Talladega, Alabama, February 13, 1856, but moved to Louisiana at the age of fifteen and made his home with Judge Potts, under whom, some years later, he read law. By a special act of the legislature, he was admitted to practise at Rayville in 1875, before reaching the age of twenty-one. While a resident of Rayville, he served two terms as district attorney.

After removing to Monroe he continued the practice of law, at which he attained much prominence.

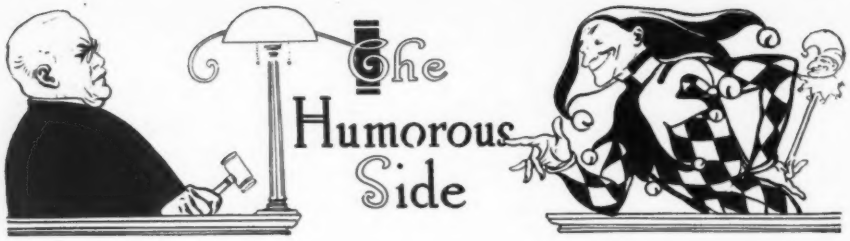
He and Judge W. N. Potts became attorneys for the Missouri Pacific & Iron Mountain when that system acquired the Houston, Central Arkansas, & Northern Railway, in 1891.

Later Judge Potts retired from the firm when he was elected district judge. Colonel Hudson continued as the company's legal representative until his death, at which time he was president of the Consolidated Ice Company and vice president of the Ouachita National Bank, two of the city's largest financial institutions.

Connecticut Jurist Dies.

Judge James P. Platt, of the United States district court, died at his home in Meriden, Connecticut, January 26. He was sixty-two years old, and was born in Towanda, Pennsylvania, on March 31, 1851. Judge Platt's family has been conspicuous in Connecticut life for generations.

He was graduated from Yale in 1873 and from the Yale Law School in 1875. He was appointed judge of the United States district court in 1902. Previous to that time he had been a member of the legislature, in 1878 and 1879, and city attorney until he was made judge of the city court.



Laugh and be fat, sir.—Ben Jonnson

Waters; and Water's Ways. A well-known New York lawyer and judge, says Brooklyn Life, invited a friend of his, a lawyer from Boston, to go for a short trip on his yacht. A storm came up, and the boat began to roll in a manner the Boston man did not relish. The judge laid a hand on his friend's shoulder, and said, "My dear fellow, is there anything I can do to make you comfortable?" "Yes," was the grim reply, "overrule this motion."

Legal Classification. "In Cork," says O'Connell, "I remember a supernumerary crier, who had been put in the place of an invalid, trying to disperse the crowd by exclaiming with a stentorian voice: "'All you blackguards that isn't lawyers, lave the presince of the court entirely, or I'll make ye, by the powers.'"

Didn't Want to Tell. At Denver a few weeks ago a colored woman presented herself at a registration booth with the intention of enrolling and casting her first vote in the ensuing election.

She gave her name, her address, and her age; and then the clerk of registration asked this question:

"What party do you affiliate with?"

The woman's eyes popped out.

"Does I have to answer dat question?" she demanded.

"That is the law," he told her.

"Den you jes' scratch my name offen dem books," she said. "Ef I got to tell his name I don't want to vote. Why, he ain't got his divorce yit!"

And out she stalked.—Saturday Evening Post.

A Good Definition. J. Van Vechten Olcott, of New York, tells the story of how Rufus Choate got from a witness the finest definition ever heard of absent-mindedness.

"What do you think is absent-mindedness?" asked Choate, who was putting the witness through a hot cross-examination.

"Well," replied the witness in a slow, deliberate tone, "if a man who thought he had left his watch at home, took it out of his pocket to see if he had time to go back and get it, I would call him a leetle absent-minded."—Popular Magazine.

Well Seasoned. A suit had been pending for more than thirty years in Connecticut, going to and fro from the supreme court, and finally after resting awhile the witnesses were found to be dying off, and it was brought to trial. Among the witnesses were two brothers, very old men, named Beech. The one first called gave a very minute narration of facts connected with the case, and the judge asked him his age, and he replied it was ninety-one years. The court asked him about his habits. He said he had always lived a temperate and upright life and never was sick a day. The court, turning to the jury, told them they could plainly see the effects of proper and temperate habits followed through a long life. And the next witness was the older brother, who was ninety-three years of age. His testimony was equally explicit in all particulars as that of his younger brother, and the court asked him about his habits, etc., about as he had the

younger brother. He said in reply, that he had led a rollicking life ever since he became fifteen years of age; had drunk, smoked, gambled, and practised many other vile habits, etc., whereupon the judge remarked to the jury that "Beech must be a very tough timber."

Up in the Air. Some time ago, a steamboat called "the Old Kentuck" blew up, near the Trinity, at the mouth of the Ohio,—where it is a well-established fact that a great many mosquitoes will weigh a pound,—by which accident a lady rejoicing in the name of Jones lost her husband and her trunk, and for both of which an action was brought.

There was, strange to say, great difficulty in proving that Mr. Jones had been on the boat at the time of the collapse, that worthy having been notoriously drunk on the wharf-boat just as the steamer left Trinity.

Many witnesses were examined to prove the fact, until finally a Mr. Deitzmar, a German, was placed upon the stand.

The attorney for the boat elicited from Mr. Deitzmar this testimony:

"Mr. Deitzmar, did you know the Old Kentuck?"

"Yah, I was blown up mit her."

"Were you on board when she collapsed her flue?"

"When she bust the bile? Yah, I wash dare."

"Did you know Mr. Jones?"

"To be sure. Mr. Jones and me took passenger togedder."

"You did? When did you last see Mr. Jones on board the boat?"

"Wall! I didn't see Mr. Jones aboard de boat de last time."

The attorney fancied his case was safe, and with a most triumphant glance at the jury said:

"You did not? Well, Mr. Deitzmar, when last did you see Mr. Jones?"

"Wall, when de schmoke pipe and me was going up we met Mr. Jones coming down."

Dimensions. A celebrated lawyer was having his head measured at a fashionable hat store the other day. The man remarked, "Why, how long your head is, sir." "Yes," said the lawyer, "we lawyers must have long heads." The man went on with his work, and soon exclaimed, "And it is thick as it is long, sir."

A Bad Habit. A certain lawyer, upon cross-examination, asked a witness if the incident previously alluded to wasn't a miracle, and the witness said he didn't know what a miracle was.

"Oh, come!" said the attorney. "Supposing you were looking out of a window in the twentieth story of a building, and should fall out and should not be injured. What would you call that?"

"An accident," was the stolid reply.

"Yes, yes; but what else would you call it? Well, suppose that you were doing the same thing the next day; suppose you looked out of the twentieth story window and fell out, and again should find yourself not injured, now what would you call that?"

"A coincidence," said the witness.

"Oh, come, now," the lawyer began again. "I want you to understand what a miracle is, and I'm sure you do. Now, just suppose that on the third day you were looking out of the twentieth story window and fell out, and struck your head on the pavement twenty stories below and were not in the least injured Come, now, what would you call it?"

"Three times?" said the witness, rousing a little from his apathy. "Well, I'd call that a habit."

And the lawyer gave it up.

Naturally. A farmer came to a small country town to consult with a lawyer. He walked along the street, looking for a lawyer's sign, and at last he saw the words, "Law Office," on a window that was three stories high. The old farmer kept looking up at the window, and walked back and forth in front of the building trying to see how to get to the lawyer's office.

In a few minutes an old colored man came along and the farmer asked him how to get up to the office. The negro looked up and saw the fire escape along the front of the building and said:

"Boss, there's the lawyer's ladder, but I expect he has gone to dinner."—National Monthly.

Positive Proof. Samuel Untermyer, the noted New York lawyer, said in Washington of a certain exposure:

"The proof was positive—as positive as the proof against the barber.

"There was a barber who was accused of secret inebriety, but his old patrons refused to credit such a charge.

"A stanch old patron went to the man to be shaved one morning. The barber in silence began to lather him, and then suddenly seized him by the nose.

"Lathering away, the barber gripped the nose so firmly that its owner grunted in pain:

" 'Here, let go my nose!'

"But the barber, still holding on tight, said as he lathered steadily on:

" 'Can't! If I did I'd fall down.' "—Record-Herald.

Marvellously Condensed. A lawyer of the good old Southern type had argued for three court days without pause. His brief was a masterpiece of classical learning and legal erudition, but it was tiresome.

"Colonel Parker," said the wearied judge at last, "without wishing to intimate in any way that the court would not be delighted to listen to your whole argument, I must suggest that the docket is somewhat crowded, and that if you could condense a little, it might help your client's cause."

The attorney smiled his acknowledgment. "Your Honor," he exclaimed, "the thought was in my mind when I prepared my argument! Suh, for the next four days my brief is a perfect marvel of condensation!"—February Lippincott's.

A Scientific Defense. "You are charged with selling adulterated milk," said the judge, according to Judge.

"So I understand, your Honor," said the milkman. "I plead not guilty."

"But the testimony shows that your milk is 25 per cent water," said the judge.

"Then it must be high-grade milk," returned the milkman. "If your Honor will look up the word 'milk' in your dictionary you will find that it consists of from 80 to 90 per cent water. I'd ought to have sold it for cream."

It All Depends. And you think a jury will give me damages?"

The junior partner wasn't certain. He called in the senior partner, who gazed at the lady for some moments. Then he went out and beckoned the junior partner after him.

"Don't take the case," he whispered. "That girl isn't good-looking enough."—Kansas City Journal.

He Filled the Bill. A stranger when dining at a foreign hotel, says the Boston Traveler, was accosted by a detective, who said to him: "Beg your pardon; we are in search of an escaped convict, and, as a matter of form, will you oblige us by showing your passport?"

"Do I look like a convict?"

"Possibly not. In any case I shall require to see your passport."

The stranger, feeling annoyed, presented the officer with the bill of fare and the latter commenced to read: "Sheep's head, neck of mutton, pig's feet."

"Very good," he observed, "the description tallies. You will please come along with us."

Came Too High. A young negro walked into the office of a prominent lawyer in Louisiana and said:

"Boss, I kum to see you 'bout gettin' me a 'vorcement."

"What's the matter, John?" said the attorney, "can't you get along with Mary, or have you found some other girl you like better?"

The negro, with a grin, admitted that he had found such a girl, and asked:

"What you goin'er charge me, Mr. Charlie?"

"Fifty dollars, John," said the attorney.

The negro moved uneasily about the office, scratched his head, but did not speak. After a few minutes the lawyer asked:

"What's the trouble, John?"

"I just tell you, Mr. Charlie," said he, "there ain't no fifty dollars difference in them gals."—National Monthly.